THE UNIVERSITY OF CHICAGO

Name: Aleena Mina Tariq
Student ID: 12110999

University of Chicago Law School

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/13/2020
Sociology (B.A.) With Honors
Public Policy Studies (B.A.) With Honors

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Chicago
Chicago, Illinois
Bachelor of Arts 2020

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	177
LAWS	30211	Civil Procedure Emily Buss	4	4	176
LAWS	30611	Torts Saul Levmore	4	4	171
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	176
LAWS	30411	Property Lee Fennell	4	4	176
LAWS	30511	Contracts Eric Posner	4	4	177
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	180
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	175
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	177
LAWS	43220	Critical Race Studies William Hubbard	3	3	178
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	176

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Wesley Campbell	3	3	176
LAWS	42301	Business Organizations Anthony Casey	3	3	180
LAWS	53347	Law and Literature Richard Mcadams	3	3	178
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
INRE	34900	Comparative State Formation Manuel Cabal Lopez	3	3	P
LAWS	43267	American Legal History, 1607-1870: Colonies to Reconstruction Alison LaCroix	3	3	177
LAWS	46101	Administrative Law David A Strauss	3	3	177
LAWS	53132	Human Trafficking and the link to Public Corruption Virginia Kendall	3	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 06/06/2023

THE UNIVERSITY OF CHICAGO

Name: Aleena Mina Tariq
Student ID: 12110999

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	179
LAWS	41601	Evidence John Rappaport	3	3	175
LAWS	53456	Comparative Race, Ethnicity and Constitutional Design Thomas Ginsburg	3	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(B)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

A PHOTOCOPY OF THIS DOCUMENT IS NOT OFFICIAL

Bridget Fahey
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
bridget.fahey@uchicago.edu | 773-702-1184

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am delighted to write this letter of recommendation for Aleena Tariq. I first met Aleena during her 1L year at the law school, when I had the pleasure of teaching her in my course Constitutional Law I: Government Structure. Aleena was a pleasure to have in class and I have been proud to see how much she has excelled in law school. I can recommend her without reservation. She has a dazzling legal career ahead of her and I am confident that she will be a terrific law clerk.

Aleena made an impression on me right away. She stood out even in a large 1L class for her poise, enthusiasm, precision, and hard work. Aleena traces her interest in the law to her upbringing in Dallas, where as the daughter of Pakistani immigrants and as part of a close-knit Muslim community, she grew up observing convulsive national and world events—from the Arab Spring to the War on Terror to immigration debates. She continued exploring her interest in contemporary affairs while majoring in Public Policy in the college at the University of Chicago before attending our law school.

As a former University of Chicago undergraduate myself, I can sometimes spot the students who did their college studies here—they tend to have an unusual confidence and bearing in confronting our dreaded cold calls, perhaps because speaking in class and learning to assert, and support, one's opinion are core aspects of the undergraduate education here. I was not at all surprised to learn that Aleena was one of our undergraduates. I try to make my cold calls rigorous and challenging (without, of course, embarrassing students or being discouraging) and Aleena notably rose to the occasion the first time she was called upon. She had clearly prepared and understood the reading, she had obviously thought deeply about it, and she came not just ready with the first sentence of an answer, but equipped to go back and forth several rounds on her views about it. She showed, in short, remarkable poise and pluck. It was a memorable exchange and one of the things that made me so eager to mentor Aleena. I could tell then that she had the portfolio of skills and the study habits to gain a great deal from law school. Aleena ultimately earned a median grade in my course. But our courses at the University of Chicago operate on a strict curve, the median is a true median, and earning that grade reflects a very good command of the material. In my constitutional law class, in particular, I find the median student to be very impressive: she spots all or nearly all of the issues and analyzes them correctly. What often distinguishes median students from those who receive our more rarefied grades are those little bursts of creativity, especially in the policy questions, which come for some students on some exams and not for others. Aleena's exam is a classic median exam—reading it makes me impressed with the high quality of our students and gives me confidence that she understood the material with sophistication. It's a very strong exam—the work of someone who will make an excellent lawyer.

I am very pleased, but not at all surprised, to see how Aleena has flourished since I first met her. For instance, she was recently chosen to be the Executive Articles Editor of the University of Chicago Law Review, a demanding position of great trust and responsibility. In that role, she leads the Articles team in selecting and editing the volume's full slate of articles and generally serves as the Review's intellectual nerve center. By the time Aleena completes her service, she will have read hundreds of academic articles to select the few the Review will publish; she will then edit hundreds of article pages, improving everything from a paper's analytics to its style and syntax to the nitty-gritty formatting of every citation. I can think of no year in the trenches better suited to preparing a student to be a successful and reliable law clerk. And it is a testament to Aleena's many talents that her peers entrusted her with this role. At the same time, Aleena has taken on demanding roles in a range of other contexts—from leadership positions in the Muslim Law Students Association and other student organizations to roles working with the Law School administration to admit new law students and support them in their first days on campus. None of that is a surprise to me—I can't think of another person I'd trust more as an ambassador for the Law School.

That brings me to Aleena's winning personality. Aleena has frequently consulted me for advice during law school and, although she is eager to take advantage of the best the experience has to offer, she is never flustered or anxious about impending decisions. She takes the stresses and opportunities of law school in a calm stride, which, it seems to me, allows her to move though the experience with poise rather than angst. Aleena is motivated and driven, but she is also able to live in the moment and soak in every aspect of the law school experience. Aleena, for instance, has admirably wide-ranging intellectual interests, which are reflected in her career aspirations; she thinks she might become a civil-rights lawyer, but is also drawn to the burgeoning effort to regulate Big Tech using the traditional antitrust toolkit. As you will see if you decide to invite Aleena to chambers for an interview, she is also very friendly and socially gracious. Whereas some students are too nervous to say hello to a professor in the hallway and others, by contrast, do so in a way that comes across as somewhat obsequious, Aleena's social demeanor is pitch-perfect and genuine. She's authentic, inquisitive, and down-to-earth. She would get along easily with a wide range of co-

clerks and judicial staff. And she would, I predict, represent chambers to the broader court community very well.

In short, I think very highly of Aleena, and I urge you to interview and hire her. I would be delighted to tell you more about her; please don't hesitate to reach out if I can be of further assistance. She's a remarkable student and I am excited to see where her legal career takes her.

Sincerely,

Bridget Fahey

Bridget Fahey - bfahey@uchicago.edu - 720-272-0844

Professor Farah Peterson
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
fpeterson@uchicago.edu / 203-464-4967

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I'm writing to express my strongest support for Aleena Tariq's application to clerk in your chambers. I have gotten to know Aleena as a research assistant and also while supervising her when she wrote one of her required longer academic writing assignments. I know that Aleena's abilities as a researcher and writer far outstrip what may be evident from her transcript alone. She is a budding lawyer of very high caliber. I have confidently relied on her for my own difficult research assignments and I know that she would make an excellent clerk.

I hired Aleena to help me with historical research for a constitutional law article that required looking through digitized archives of early American newspapers and cross-checking the results against certain footnotes in secondary sources that I was relying on in my research. She was one of my most careful and diligent RAs, staying up late to make sure that she had sent me the reams of material in the format that would be most helpful to me, and going back and doing the difficult work again when I asked for her to send me things labeled in a different way, or to search for a different set of words and phrases. She was helpful, organized, and thorough—qualities that one doesn't always find in students who, after all, have their own studies to worry about! The following year, when I supervised her comment, I noticed these same careful qualities in her own original work.

Perhaps Aleena's most impressive accomplishment at law school has been her management of the the Articles Committee of the Chicago Law Review. While leading the articles committee, Aleena had to manage both short and longer-term schedules, deal gracefully with students on her team with competing personalities and preferences, manage law professors in many capacities, and implement a vision for the content of the Law Review. In this work, her many impressive talents shone. She is brilliant and managing people, because she is both competent and fun to be around—two qualities that most people can't combine. And perhaps most importantly, Aleena keeps trains running on time. As my RA, she was the one who checked in with me about what I needed and made sure that the logistics of my project were taken care of. For her academic writing assignment, she sent me a detailed schedule of our meeting dates and follow up. Even for this letter, she sent me what I needed, and let me know her application schedule and plans well in advance.

Aleena is a kind, interesting, intelligent, and well-rounded person. She's a person who speaks four languages but who doesn't let the mood of an office get too serious. She's the type of person who tries to make friends with everyone. Most importantly, she's someone who brings professionalism to every task. I would not hesitate to hire her again, and I think she'll make an excellent clerk.

All my best,

Farah Peterson

Professor Anthony J. Casey
Deputy Dean, Donald M. Ephraim Professor of Law and Economics,
Faculty Director, The Center on Law and Finance
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
ajcasey@uchicago.edu | 773-702-9578

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to enthusiastically recommend Aleena Tariq for a clerkship in your chambers. Aleena's exceptional research skills and personal qualities make her an ideal candidate for a clerkship.

I had the pleasure of teaching Aleena in the fall in my Business Organizations class. I also got to know her outside of class through the many leadership positions she holds in the Law School's student organizations.

Aleena's academic ability is exemplary, as evidenced by her rigorous coursework and outstanding performance. In my class, her participation and exam demonstrated insightful legal analyses, exceptional research and writing skills, and an ability to grasp complex legal concepts and present them with clarity and precision.

In addition to her academic achievements, Aleena has actively contributed to the community at the Law School through her role as the Executive Articles Editor of the Law Review. In this position, she has demonstrated her meticulous attention to detail, exceptional editorial skills, and a deep understanding of legal scholarship. Aleena's keen ability to evaluate scholarly works and legal arguments within them, will prepare her well for the research process involved in clerking.

Beyond her academic pursuits, Aleena has been deeply involved in various student organizations and community initiatives. Her leadership positions within the Muslim Law Students Association and the South Asian Law Students Association reflect her commitment to fostering inclusivity and cultural understanding and connecting to her fellow students. Aleena has also displayed her leadership abilities as the Co-President of the Labor & Employment Law Society. In this role, she successfully organized events, guest lectures, and panel discussions on pertinent labor and employment law issues.

I have full confidence in Aleena's abilities, character, and potential as a judicial clerk. Her intellect and analytical insight make her an outstanding candidate. I recommend Aleena for a clerkship with high praise.

If I can be of further assistance, please let me know.

Very truly yours,
Anthony J. Casey

ALEENA M. TARIQ
12 Armstrong Dr., Frisco, TX 75034 | 5454 South Shore Dr. #921, Chicago, IL 60615
amtariq@uchicago.edu | (972) 742-7820

WRITING SAMPLE

I wrote the attached brief for my Spring 2022 class LAWS 37102: Legal Research, Writing, and Advocacy as a first-year law student at the University of Chicago Law School. In this assignment, I acted as counsel for Datavault in the appealed fictional Northern District of Illinois case *Midway v. Datavault*, No. 0:21cv001-BIGELOW (N.D. Ill. Aug. 1, 2021), at this point being argued in front of the Seventh Circuit. As a brief factual background, the case involved an accidental data leak of plaintiff-appellant Midway's information stored in defendant-appellee Datavault's security system. Plaintiff brought claims for damages sustained from the data breach and for negligence, and the district court granted Datavault's motion to dismiss for lack of subject matter jurisdiction, reasoning that plaintiff lacked standing to make the claims. FED. R. CIV. P. 12(b)(1). On appeal, appellee argued that appellant lacked Article III standing. The question presented was: does a plaintiff who has not yet experienced harm as a result of a data breach satisfy Article III standing?

I received some feedback on an initial draft from my instructor, but this brief was written by me in its entirety.

STATEMENT OF JURISDICTION

This case is a diversity case, which the district court heard pursuant to 28 U.S.C. § 1332. The district court entered a final judgment dismissing the complaint on August 1st, 2021. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Article III standing requires all of the following: (1) injury in fact, (2) fair traceability of the injury to defendant, and (3) judicial redressability of the injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Davidson Datavault, LLC suffered a data hack. *Midway v. Datavault*, No. 0:21cv001-BIGELOW, slip op. at 5 (N.D. Ill. Aug. 1, 2021). Datavault customer Danny Midway had minimal information leaked in the hack but suffered no fraudulent charges or identity theft. *Id.* at 8. Does Midway adequately assert the three requirements for Article III standing?

STATEMENT OF THE CASE

I. Statement of the Facts

This case stemmed from an attack on Davidson Datavault, LLC's ("Datavault") security system in September 2020. *Id.* at 5. Minimal information—just an internal identification number and an encrypted password—was implicated in this hack. *Id.* at 3. Datavault soon notified its customers of the hack and swiftly offered "free credit monitoring and identity theft protection from Morse Monitoring for a year" to quell customers' fears. *Id.* at 5.

Danny Midway ("Midway") was affected by this hack. *Id.* at 2. After the hack occurred, Midway took steps to protect the already encrypted password-backed data that were potentially compromised. *Midway*, slip op. at 6. Such steps included availing himself of the Morse Monitoring offer from

Datavault; changing usernames and passwords stored in Datavault; canceling the credit card stored on Datavault; and placing a temporary security freeze on his credit report. *Id.* at 6–7.

After taking these precautions, Midway alleged that his business suffered without a credit card, and the security freeze on his credit report prevented him from acquiring a new credit card. *Id.* at 7. Such actions—taken in service of identity theft and fraudulent charges that didn't actually materialize—"worried and concerned" him. *Id.* Midway, who was seeing a therapist before the Datavault hack, spent some sessions discussing the emotional effects of the hack. *Id.* at 8.

Midway brought suit, seeking $100,000 in damages from Datavault. *Id.* at 1.

II. Proceedings Below

Datavault moved to dismiss for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). The district court granted Datavault's motion to dismiss. *Midway*, slip op. at 1.

SUMMARY OF ARGUMENT

The requirements to have Article III standing are injury in fact, fair traceability to defendant, and risk that the harm will not be redressable by judicial relief. *Lujan*, 504 U.S. at 560–61. Datavault need only prove that one of these elements is not met to undercut standing. Thus, the Court of Appeals should affirm the court's dismissal for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1).

Midway is unable to assert injury in fact for three reasons. First, the Seventh Circuit does not recognize emotional distress as a concrete injury that establishes standing. *See Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022). Second, Midway has not experienced fraudulent credit card charges or identity theft. *Midway*, slip op. at 8. Third, the risk of future harm is not "certainly impending" when mitigatory measures have been taken. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398,

416 (2013). Midway asserts that he has incurred costs in service of mitigating future risks from the hack. However, any costs incurred toward a harm that is not certainly impending do not constitute injury in fact to establish standing. *See id.* at 410.

Midway's emotional distress is not fairly traceable to Datavault's breach. Midway's emotional distress did not originate with the Datavault hack. *Midway*, slip op. at 8. Other companies also experienced the same hack in their systems that could have been the cause of Midway's risk of harm. *Id.* at 6.

Finally, Midway cannot be adequately redressed by judicial relief. First, no recoverable injury has occurred. *Id.* at 8. Second, Midway is unable to assert money damages for a risk of future harm. *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022) ("A plaintiff seeking money damages has standing to sue in federal court only for harms that have in fact materialized."). Third, Datavault proactively reimbursed Midway for credit monitoring services. *Midway*, slip op. at 5.

ARGUMENT

The district court's dismissal for lack of subject-matter jurisdiction should be affirmed. Article III standing has three requirements. *TransUnion v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (citing *Lujan*, 504 U.S. at 560–61). Midway "must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* The standing requirements are a checklist and not a balancing test. Establishing that even one of these requirements is not met is thus grounds for affirming a dismissal for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1).

The argument discusses plaintiff's lack of injury in fact, the most salient of the requirements in the instant case. It then transitions to a discussion of the other two requirements of standing,

causation and redressability, demonstrating that Midway is unable to meet either of them. Consequently, Midway does not have standing to bring this action.

I. Midway has not asserted sufficient injury in fact to establish standing.

An injury in fact must be "concrete, particularized, and actual or imminent." *TransUnion*, 141 S.Ct. at 2203. Midway's injuries are not concrete. Further, the risk of future harm is not imminent. Finally, the lack of imminence demonstrates why any actual costs that Midway has allegedly incurred do not establish injury in fact under the standing doctrine.

A. Midway cannot demonstrate concrete injury.

1. Emotional distress is not a concrete injury that establishes standing.

Midway's allegations of emotional distress do not establish standing. Midway asserted that he had "substantial stress" and "spent several sessions focused on the anxiety related to the Datavault data breach. He also experienced insomnia and had trouble focusing on his work during the day." *Midway*, slip op. at 8. Likewise, in *Pierre*, plaintiff-appellant alleged that she experienced emotional distress after receiving a letter that asked for payment on outstanding debt.[1] *Pierre*, 29 F.4th at 936. However, "pure psychological harm" is insufficient to establish standing. *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 616 (7th Cir. 2015). The Seventh Circuit confirmed last year: "emotional distress . . . is insufficient to confer standing." *Pierre*, 29 F.4th at 939. The Seventh Circuit has "expressly rejected 'stress' as constituting concrete injury." *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021) (quoting *Pennell v. Global Tr. Mgmt.*, 990 F.3d 1041, 1045

[1] *Pierre's* holding applies to this case. The fact that *Pierre* (and other cases cited in this brief) arises out of an alleged statutory violation of the Fair Debt Collection Practices Act (FDCPA) is immaterial in its applicability to the common law claims asserted in *Midway*. 29 F.4th at 938. A statutory violation "must bear a close relationship in kind to those underlying suits at common law." *Id.* (citing *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462–63 (7th Cir. 2020)). Thus, a statutory violation cannot stand alone as a sufficient allegation of injury to establish standing. *TransUnion*, 141 S.Ct. at 2205. The common law parity requirement for statutory violations means that comparison to ostensibly inapplicable cases like *Pierre* is valid. 29 F.4th 934.

(7th Cir. 2021)). Anxiety is also not an injury in fact to establish standing. *Id.* "The concreteness requirement would be an empty one" if simple emotional distress were enough to trigger standing, since such a threshold would require very little factual support. *Pierre*, 29 F.4th at 939.

2. Risk of future harm is definitionally not a concrete injury.

To establish standing, "a 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (quoting BLACK'S LAW DICTIONARY 479 (9th ed. 2009)). However, Midway himself admitted "that he has not yet been a victim of identity theft or experienced any fraudulent charges." *Midway*, slip op. at 10. These harms are thus not concrete enough to establish standing. Any harms asserted as concrete are incurred only because Midway found excess but immaterial risk. Thus, any harm asserted by Midway was speculative in service of a harm that is not imminent. This does not establish standing.

Further, hackers got access to very minimal information. *Id.* at 5. The only information at risk was Midway's internal identification number and his encrypted password. *Id.* The information that would be potentially compromising is securely behind the unbreached encrypted password. *Id.* None of the information behind the password has been breached. *Id.*

B. Midway's allegations of future harm do not show imminence sufficient to establish standing.

As shown above, Midway did not experience concrete harm from the hack. *Id.* However, if this Court does find concrete injury, Midway still cannot establish an actual or imminent injury. A risk of future harm is definitionally not "actual," since it is not occurring in the present. Thus, we look to imminence, which Midway is also unable to establish.

1. The risk of future harm is too speculative to establish imminent injury.

A risk of future harm that is "too speculative" is not imminent injury. *Clapper*, 568 U.S. at 410 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009)). Midway asserted future harms that

reflect a "highly speculative fear" of identity theft and fraudulent charges. *Clapper*, 568 U.S. at 410. Such fears are not actual.

The Supreme Court laid out a hypothetical "speculative chain of possibilities" in *Clapper*, all of which would have had to occur for injury to result. *Id.* at 410. Likewise, Midway asserts two future harms that rest on a similar chain of possibilities. First, Midway asserts injury based on an increased risk of fraudulent credit card charges. *Midway*, slip op. at 9. Recall that the only information implicated in the hack was Midway's internal identification number and unbreached encrypted password. *Id.* at 5. For fraudulent charges to result, Midway would need to show that: (1) the hackers would be able to decrypt the password, (2) they would choose to use the information in the digital vault to their advantage, and, most importantly, (3) they would be able to use the information in the digital vault. *See generally Clapper*, 568 U.S. at 410 (using a similar pattern of explication for its "speculative chain of possibilities").

The first link has not occurred and, as such, amounts to "mere speculation." *Clapper*, 568 U.S. at 410–11. Datavault's primary business is the protection of safeguarded information, so the encryption is presumably strong enough to repel hackers. The second link amounts to speculation about the hackers' future choices, which Midway cannot prove. The third is largely a physical impossibility—Midway has himself admitted that "he manually changed each of the usernames and passwords he stored in Datavault," taking copious time in doing so. *Midway*, slip op. at 6. Any potential leak of Midway's information is thus far less likely to lead to injury since information behind the encrypted password is now unusable. Through his own actions, Midway has himself made it more difficult to assert that an injury is likely to occur.

Second, Midway asserted injury based on an increased risk of identity theft. *Id.* at 9. In order for identity theft to occur, (1) hackers would either have to bypass and decrypt the encrypted passwords or know that the ten digits in the internal ID number were the affected party's social

security number, and (2) Midway would need to provide proof that the hackers planned to use the social security numbers to actually engage in identity theft. Midway has not shown evidence supporting these propositions. *Id.* at 8. The lack of any identity theft while the hackers have the internal identification number indicates that identity theft is less likely to occur in general.

2. Speculative harms are not certainly impending.

Simple assertion of speculative future harm does not prove imminence. *Clapper*, 568 U.S. at 410. Because the alleged risk of future harm to Midway has not materialized, Midway cannot argue that such risks are certainly impending. *Id.* The Supreme Court held that "if an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm." *TransUnion*, 141 S.Ct. at 2211. As explained below, Midway has experienced no fraudulent charges or identity theft, which is the actual harm that would need to materialize in order to create standing. *Midway*, slip op. at 8.

The Seventh Circuit held that plaintiffs like Midway "should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such injury will occur." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2021) (quoting *Clapper*, 568 U.S. at 410).

This argument is inapplicable to *Midway* for two reasons. First, notably, *Remijas* involved a plaintiff whose credit card and identity had already been breached. *Remijas*, 794 F.3d at 690. Midway has had no credit card fraud.[2] *Midway*, slip op. at 8. Fraudulent charges may be an injury in fact that establishes standing. Lack thereof in Midway's case sufficiently distinguishes it from *Remijas*. *Id.* Second, the Supreme Court rejected the "objectively reasonable likelihood" standard in *Clapper*. 548 U.S. at 410. That Court held that the "'objectively reasonable standard' is inconsistent with our

[2] The Seventh Circuit's decision in *Lewert* is also inapplicable for the same reason. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016). The plaintiffs in that case also had fraudulent credit card charges that had already occurred. *Id.*

requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). *Remijas* thus misapplied the "objectively reasonable likelihood" standard. 794 F.3d at 693.

C. Because future harms are not imminent, Midway is unable to establish standing for alleged present incurred costs.

As discussed above, Midway has not shown injury in fact, since he cannot prove that the injury is "concrete, particularized, and actual or imminent." *TransUnion*, 141 S.Ct. at 2203. Thus, this Court cannot find that present incurred costs constitute injury in fact, since a plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper,* 568 U.S. at 402.

1. Midway's alleged incurred costs do not constitute actual injury.

Midway's present injuries are not sufficient to constitute an injury in fact because the future risk of fraud is not imminent. Midway alleges that he incurred costs in four ways in anticipation of fraudulent charges and identity theft: (1) manually changing all of his usernames and passwords, (2) canceling the credit card stored on Datavault, (3) monitoring his financial accounts every day, and (4) expending money on therapy. *Midway*, slip op. at 6–7. However, he concedes that no fraudulent charges or identity theft have occurred and, as discussed above, is unable to demonstrate that the fraudulent charges or identity theft protected against are "certainly impending." *Clapper,* 568 U.S. at 402. The only costs Midway has incurred have been only in furtherance of protecting information that was not leaked.

The Supreme Court held that a plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 402. The Court elaborated that the "mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm." *TransUnion*, 141 S.Ct. at 2211 (2021) (emphasis in original). The "exposure to the risk of future

harm" in *Midway* would be fraudulent charges and identity theft. *Id.* However, these risks have not actually materialized into a separate concrete harm. *Midway*, slip op at 8.

In other words, in order for the costs allegedly incurred by appellant to show standing by the Court under Article III, Midway must demonstrate that fraudulent charges or identity theft are certainly impending. However, Midway fails to demonstrate that these charges are certainly impending due to the highly attenuated chain of possibilities that would have to occur before the risk of future harm alleged would actually materialize. *See supra* pp. 2–4.

Further, Midway's alleged costs are taken in furtherance of protecting information that was never breached and is securely behind an encrypted password. *Midway*, slip op. at 5. Therefore, the alleged costs aren't sufficient to establish injury.

2. The potential sensitivity of the information has no bearing on the injury's imminence.

The district court correctly found that the sensitivity of the data did not bear on Midway's injury argument. *Id.* at 10–11. The district court held that "whether a data breach exposes consumers to a material threat of identity theft turns on *two factors* that derive from *Remijas*: (1) the sensitivity of the data in question . . . and (2) the incidence of fraudulent charges and other symptoms of identity theft." *Id.* at 10 (quoting *Kylie S. v. Pearson PLC*, 475 F.Supp.3d 841, 846 (N.D. Ill. 2020)) (emphasis added).

However, this argument fails since "Midway has not alleged that he or any Datavault user experienced 'fraudulent charges and other symptoms of identity theft' following the Datavault breach." *Id.* at 11 (quoting *Kylie S.*, 475 F.Supp.3d at 846). When there has been no actual injury, the sensitivity of the data is not sufficient to establish injury in fact. It does not follow that there is an imminent risk of future harm simply because the data is particularly sensitive.

II. Even if the court finds injury in fact, Midway cannot fairly trace the injury to Datavault.

A. Midway's emotional distress did not originate with this hack.

As discussed above, emotional distress is not an injury that establishes Article III standing. *See supra* pp. 4–5. However, the argument for emotional distress is unavailing even if this Court finds that emotional distress qualifies as injury in fact.

To show that Midway's emotional distress is fairly traceable to Datavault, Midway would need to show that the emotional harm arose as a result of the data hack. However, Midway admitted that he "regularly sees a therapist for anxiety." *Midway*, slip op. at 8. Further, he admitted that he "had previously been the victim of fraudulent credit card transactions after a data breach." *Id.* Thus, the Datavault hack was not the immediate impetus for Midway to attend therapy. If this Court allows Midway to assert that merely attending therapy establishes traceability to Datavault, any plaintiff who generally attends therapy or receives psychological treatment will be able to establish standing without demonstrating how the specific case uniquely caused the emotional distress.

B. No injury can be fairly traced to action by Datavault.

Even if this Court finds injury in fact, such action cannot be fairly traced to the Datavault hack. While there was a hack of Datavault's system, the "Alison Attack" also affected ten other technology companies. *Id.* at 6. Midway gave no evidence that his information couldn't have been implicated in hacks of any other technology company. Thus, Midway cannot accurately assert that the vulnerability of his information was directly traceable to the Datavault hack.

The Seventh Circuit seemingly rejected the argument that other companies' data hacks would undercut traceability for establishing standing. *Remijas*, 794 F.3d at 696. However, *Remijas* involved a data breach without a common attacker or attack mechanism. *Id.* Datavault was the victim of a named attack whose data breach mechanism ostensibly works in the same way across breaches. *Midway*, slip op. at 6. Other technology companies also experienced "Alison Attacks." *Id.* It is far more likely that the information at stake in this case could have been jeopardized by any other of the ten technology

companies. Midway's lack of evidence against this claim means that he has not established traceability under the *Lujan* test. *Lujan*, 504 U.S. at 560–61.

III. Even if the court finds that there is injury and traceability, Midway's alleged injury is not adequately address by judicial relief.

A. Plaintiff cannot recover for harms that have not yet occurred.

The Seventh Circuit held that where there is no harm, there is nothing for a court to remedy to provide relief to an aggrieved plaintiff. *See Pierre,* 29 F.4th at 938. The *Pierre* court discussed an earlier Seventh Circuit holding in which a statutory violation did not cause any concrete harm to the plaintiff, so "there was nothing for the court to remedy." *Id.* (citing *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019)). The Seventh Circuit clarified that a plaintiff can sue "only for harms that have in fact materialized." *Id.* As shown above, however, no harms have materialized for which Midway can assert standing. *See supra* p. 6.

B. Midway cannot assert standing for money damages.

Midway cannot receive judicial relief from this Court because he cannot assert standing for money damages for a risk of future harm. The Seventh Circuit held that "a risk of harm qualifies as a concrete injury only for claims for 'forward-looking, injunctive relief to prevent the harm from occurring.'" *Pierre*, 29 F.4th at 938 (quoting *TransUnion*, 141 S.Ct. at 2210). However, "Midway seeks damages in excess of $100,000." *Midway*, slip op. at 1. Midway thus lacks standing to sue because he seeks money damages instead of injunctive relief.

C. Datavault has already reimbursed Midway for credit monitoring.

If the Court believes that there was an obligation for Datavault to compensate Midway for any costs that Midway incurred in protecting his unbreached information, Midway still would be unable to establish that his injury is redressable by judicial relief. The only costs that were actually incurred were those related to continued monitoring of financial accounts. *Id.* at 9. Where the cost of

monitoring one's credit card information is involved, Midway foreclosed relief by accepting "Datavault's offer of free credit monitoring and identity theft services" and using them to protect his business. *Id.* at 6. He has also used the credit monitoring services to "monitor his financial accounts every day." *Id.*

The Seventh Circuit held in *Remijas* that it was dispositive that the defendant, "offered one year of credit monitoring and identity-theft protection to all customers for whom it had contact information." 794 F.3d at 696. However, "Seventh Circuit precedent suggests that the provision of credit monitoring plays a minor part in standing analysis, not the decisive role Plaintiffs[] envision." *Kylie S.*, 475 F.Supp.3d at 848 (citing *Lewert*, 819 F.3d at 967). The district court concluded that firms may have a business interest in offering credit monitoring even where there is "little or no risk" from the hack. *Id.* Further, the ability to assert injury in fact when free credit monitoring is offered creates a perverse incentive where firms are less likely to provide these *ex abundanti cautela* mitigatory measures if such measures will be taken as an admission of liability. *See id.*

ALEENA M. TARIQ
12 Armstrong Dr., Frisco, TX 75034 | 5454 South Shore Dr. #921, Chicago, IL 60615
amtariq@uchicago.edu | (972) 742-7820

WRITING SAMPLE

I wrote the attached essay as my student comment for *The University of Chicago Law Review*. The comment attempts to answer the question of whether the Federal Arbitration Act's interstate worker exemption applies to rideshare drivers. The comment makes two fundamental arguments. First, the FAA is inadequate to speak to the issue of rideshare drivers' circumstances, and second, any hope that the FAA had for coherently covering the rideshare industry has been defeated by the courts' completely unworkable scheme for understanding the role of rideshare drivers in interstate commerce.

I have excerpted sections II and III(C) of the comment, which discuss the legal background and the analysis of "interstate commerce" as interpreted by circuit courts applying the phrase to rideshare drivers. Through this section, I specifically argue that a broader interpretation of interstate commerce is appropriate to accommodate rideshare drivers within the ambit of the exception.

This is an initial draft written by me in its entirety.

II. LEGAL BACKGROUND

This issue's legal landscape involves a protracted tension between arbitration and litigation and a circuit split reflecting that tension. Employers find arbitration to be an efficient, smooth, and low-cost way to resolve disputes. But according to employees, it is unfairly disposed toward employers' interests, leaves a decision to an arbitrator and not a judge, limits discovery, and functions as a tool of employer domination over employee rights.

Rideshare workers, specifically, are subject to contractual mandatory arbitration agreements that make it difficult to fairly redress concerns around wage and hour disputes, independent contractor status, or payment issuance problems. However, the FAA's exemption for interstate workers has recently gained steam as an argument that would allow rideshare drivers to sidestep mandatory arbitration agreements and instead litigate disputes in front of a judge. The stakes here are apparent: Uber drivers collectively represent a working population of 1.2 million active drivers, and combined with Lyft, this number is even higher.[1]

A. Arbitration vs. Litigation

Case law in this area overwhelmingly points to the legality of the use of arbitration for employer disputes with rideshare workers, with a building presumption for arbitration in almost every context.[2] A key policy outcome differential remains, however, because protections are disparate for unionized employees as compared to independent contractors.

Traditionally, unions served as a counterbalance against employers who sought to take advantage of their employees' hours and wages. The ability of unionized employees to bargain for their rights, including wages, benefits, and vacations, has been a critical source of worker protections.[3] Strength was found in numbers, where the individual laborer had a very small ability to exert force on an employer to improve working conditions, but a large group had much more influence and sway.[4] Thus, collective bargaining allowed for the advent of many worker protections now taken for granted.[5]

However, the current environment in labor relations is less worker-friendly and especially less union-friendly. Increasingly, companies have sought to classify their workers under an independent contractor status, which allows them to skirt the aforementioned worker protections that they would otherwise be obligated to provide.[6] This individualization has stripped away many of

---

[1] Dara Khosrowshahi, *The High Cost of Making Drivers Employees*, UBER (Oct. 5, 2020), https://perma.cc/8AT8-TTGA.

[2] *See Capriole v. Uber Techs. Inc.*, 7 F.4th 854 (9th Cir. 2021); *Cunningham v. Lyft, Inc.*, 17 F.4th 244 (1st Cir. 2021); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[3] William J. Tronsor, *Unions for Workers in the Gig Economy: Time for a New Labor Movement*, 61 LABOR L. J. 181 (2018).

[4] Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERK. J. EMP. & LAB. L. 71, 78 (2014).

[5] Tronsor, *supra* note 3.

[6] Rachel Childers, *Arbitration Class Waivers, Independent Contractor Classification, and the Blockade of Workers' Rights in the Gig Economy,* 69 ALA. L. REV. 533, 534 (2017).

the advantages that collective bargaining and the strength-in-numbers approach bestows.[7] Consequently, the best option that independent actors have for asserting their right rests in litigation. Professor Alexander Colvin writes that "litigation operates as a source of bargaining power for employees in the individual rights era that parallels the role of strikes as the source of bargaining power for employees in the collective bargaining system of the New Deal era."[8] This is because litigation presents uncertainty and economic costs—discovery, attorney's fees, depositions—that may be burdensome enough to cause employers to minimize legal risks—and improve working conditions.

Importantly, these are not risk costs inherent in arbitration. Arbitration instead presents a lower-cost, more favorable alternative to litigation specifically for the employer.[9] Arbitration's main benefits are related to mitigating administrability concerns and increasing the efficiency of resolving disputes. Litigation has large-scale expenditures on discovery and attorney's fees, as well as uncertainty in outcomes and appealability; arbitration is a forum that is secretive, has no realistic possibility of appeal, and does not have the capacity to handle discovery that courts do.[10] Arbitrators are not judges, and the process is overall much less procedural and formal than in traditional litigation. Thus, in the current independent contractor-heavy labor landscape, litigation represents rideshare workers' most realistic attempt at recreating the New Deal-era bargaining power that netted them favorable outcomes.

B. Statutory Text

The Federal Arbitration Act codifies the enforceability of arbitration agreements generally.[11] Section 1, however, lays out some exceptions to this general enforceability. The text of the exemption is the main source of law at play in this comment: "nothing herein [in the rest of the statute] contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[12] This has created significant consternation, and its scope and implementation have been reshaped by the judiciary numerous times. Specifically, controversy arises out of the meaning of three main phrases in the statutory text: "class of workers," "engaged in," and "interstate commerce." This comment explores the three phrases in further depth in the context of rideshare drivers specifically.

---

[7] Colvin, *supra* note 4, at 78 (explaining how bargaining power exists in large numbers because of the power of the strike, which puts significant economic pressure on employers).

[8] *Id.* at 79.

[9] *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL. INST. Working Paper 414 (2015); see also Colvin, *supra* note 4, at 79–82 (finding large discrepancies in win outcomes for employees between arbitration and litigation).

[10] Colvin, *supra* note 4, at 79.

[11] 9 U.S.C. §§ 1–14.

[12] 9 U.S.C. § 1.

III. Analysis

This comment serves to determine whether rideshare drivers are subject to the Federal Arbitration Act's (FAA) transportation worker exemption and whether the FAA should govern this question in the first place.[13] In doing so, we look to the words of the statute to understand whether rideshare drivers are a "class of workers engaged in . . . interstate commerce"[14] in light of the different approaches taken by the Circuit Courts and under the Supreme Court's guidance in *Southwest Airlines v. Saxon*.[15] This implicates three broad questions (the first two of which are omitted in this writing sample).

First, what is a class of workers where rideshare drivers are involved? Cases involving rideshare drivers specifically related to arbitration are new—the first court to take up this issue on appeal was the Third Circuit in 2019.[16] But there is existing guidance from other industries and other cases. We see cases involving truck drivers, bus line employees, and airline cargo loaders as analogues, though somewhat imperfect, for examining this question.[17] More conceptually, the comment frames this question as a main character inquiry. Whose interests are courts adjudicating when evaluating rideshare arbitration agreements? Does it make a difference what *type* of worker is implicated in the litigation? Does a rideshare driver's independent contractor status leave them vulnerable to more arbitration-based abuses?

Second, what does "engaged in" mean for the purposes of this analysis? Much of this discussion stems from the Supreme Court's decisions in *Circuit City Stores, Inc. v. Adams*[18] and *Allied-Bruce Terminix Co. v. Dobson*.[19] The *Circuit City* Court held that "engaged in" referred to a sort of "active employment" with commerce, not just a loose connection to it.[20] This was a significantly narrowing interpretation from statutes that used the terms "affecting commerce" and "involving commerce." *Saxon* complicates this inquiry because the Court used yet another variant—"intimately involved."[21] Though this is not articulated as a definitive legal standard for determining the employee's involvement with their work as determining whether they are "engaged in" commerce, the Court's interpretation of the term still adds complexity to the Court's future treatment of the "engaged in" analysis.

Third, how do we decide if rideshare drivers are engaged in *interstate commerce* specifically? Classes of drivers have advanced two main justifications for their purported exempt status: (1) that

---

[13] *Id.*

[14] *Id.*

[15] *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783 (2022).

[16] *Singh v. Uber Techs. Inc.*, 939 F.3d 210 (3d Cir. 2019).

[17] *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2d Cir. 2022); *Amalgamated Ass'n St. Elec. Ry. & Motor Coach Emp. of Am., Loc. Div. 1210 v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3d Cir. 1951); *Pennsylvania Greyhound Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am., Div. 1063*, 193 F.2d 327 (3d Cir. 1952); *Saxon*, 142 S. Ct. at 1783.

[18] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

[19] *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995).

[20] *Circuit City*, 532 U.S. at 116 (citing *Jones v. United States*, 529 U.S. 848, 855 (2000)).

[21] *Saxon*, 142 S. Ct. at 1790.

drivers do, as a matter of fact, cross state lines on some trips;[22] and (2) that drivers often transport passengers to airports, who then travel interstate.[23] They argue that these facts should extend to them statutorily guaranteed interstate worker protections, both as a function of their proximity to the category of transportation workers and the inherent interstate nature of their work. These arguments implicate broad line-drawing problems. What percentage of crossing state lines is enough to constitute interstate commerce, and where do we break this chain of commerce?

These arguments also draw attention to the prevailing logic in *Circuit City* that asks whether the aggrieved party is similar enough to seamen and railroad employees in that Court's application of ejusdem generis to qualify for the interstate worker exemption.[24] It's clear that rideshare drivers are engaged in transportation. But how close does the association to seamen and railroad employees need to be? Does the FAA's legislative history demonstrate that these categories, and thus the Court's application of ejusdem generis, may be misguided? And finally, given the myriad changes in the transportation industry and nature of work in the last 100 years since the FAA passed, is this distinction one worth preserving?

In addressing the questions raised above, we follow the words of the statutes and discuss each provision in turn. Thus, the analysis will follow the text: (A) class of workers, (B) engaged in, (C) interstate commerce.[25] . . .

C. Interstate Commerce

The interstate commerce question is perhaps the most salient in deciding whether rideshare drivers are exempt from the FAA. This question implicates a variety of dimensions—where the chain of commerce begins and ends, how much of the commerce needs to be interstate, and how binding precedent may or may not apply. This comment gives an overview of how rideshare and adjacent cases have handled the inquiry generally and then discusses each in turn.

1. Breaking the chain of commerce.

This section examines how courts have attempted to draw a line in rideshare drivers' involvement in the stream of commerce. This question is further complicated by the fact that what drivers transport are people, not goods. Thus, people's autonomous movements may require a new framework that doesn't have purchase under existing case law.

a. *Circuit City* assumed a narrow conception of Congress's commerce power over employment contracts.

[22] *See Cunningham*, 17 F.4th at 252; *see also Capriole*, 7 F.4th at 863.
[23] *See Cunningham*, 17 F.4th at 250; *see also Capriole*, 7 F.4th at 861.
[24] *See Circuit City*, 532 U.S. at 114–19.
[25] 9 U.S.C. § 1.

Circuit City, like in the other statutory applications, played a large role in limiting the applicability of the commerce power. That Court took a minimalistic approach to the Commerce Clause generally.[26] This had the effect of implicitly narrowing the scope of commerce that future employees and workers could call upon in assessing the viability of their exemption from the FAA to just transportation workers. Thus, the Commerce Clause power as conceived of by the *Circuit City* Court was one of limited applicability and scope.

The dissent, however, embraced a wider understanding of the commerce power where arbitration was concerned, reasoning that the *Allied-Bruce* Court's expansion of the commerce power over employment contracts was applicable in *Circuit City* as well.[27] Justice Souter considered the "context of the time," finding the majority's approach "read as petrified when coverage language is read to grow."[28] Thus, an evolutionary reading of § 1, to match the reading of § 2 in *Allied-Bruce*, was apposite.[29] These competing approaches and their resulting debates are reflected in how cases moving forward have treated them.

b. The circuit courts applied the *Circuit City* understanding of the commerce power to limit their understanding of rideshare drivers as being in the stream of commerce.

The Ninth Circuit in *Capriole* and the First Circuit in *Cunningham* applied the *Circuit City* understanding of commerce to whether rideshare drivers are engaged in interstate commerce through their transportation of passengers to airports, passengers who will eventually themselves cross state lines.[30] The courts squared this result in a couple of ways. First, they examined the rates at which airport trips constitute interstate travel.

Second, they cut the chain of commerce at the passenger who travels. Both cases analogize to a Supreme Court holding on a determination of interstate commerce for an antitrust conspiracy inquiry. Through invoking *United States v. Yellow Cab*,[31] they put the passenger in the interstate traveler category and excluded the driver from the interstate commerce inquiry entirely. The Supreme Court held in *Yellow Cab* that, as part of a Sherman Act antitrust conspiracy inquiry, cab drivers were not engaged in interstate commerce because they performed intrastate work for travelers who crossed state lines.[32] Thus, though their contact with interstate commerce was "only casual and incidental,"[33] the real interstate actor is the passenger who "embark[s] upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago[.]"[34]

---

[26] *Circuit City*, 531 U.S. at 112–13, 116.
[27] *Id.* at 136 (Souter, J., dissenting) (citing *Allied-Bruce*, 513 U.S. at 264).
[28] *Id.* at 136–37 (Souter, J., dissenting).
[29] *See id.* at 134 (Souter, J., dissenting).
[30] *See Capriole*, 7 F.4th at 854; *see also Cunningham*, 17 F.4th at 244.
[31] *United States v. Yellow Cab*, 332 U.S. 218 (1947).
[32] *Id.* at 230 ("[S]uch transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act.").
[33] *Id.* at 231.
[34] *Id.* at 230.

c. *Saxon* complicates.

The Supreme Court in *Saxon* may have settled the issue, though depending on how its holding is interpreted, it may just be interpreted to be cabined to its facts. In *Saxon*, the Court held that workers who are "directly involved in transporting goods across state or international borders [fall] within §1's exemption."[35] It seems that Saxon's precedential value is limited, however, based on language from Justice Thomas.

In what seems to be a pattern among judges who decide cases in this realm, the Court declined to offer a test or a line at which a driver, or any other employee, is no longer within the stream of interstate commerce. The Court, in fact, decided to not extend the holding beyond airline cargo loaders, writing that "the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders. In any event, we need not address those questions to resolve this case."[36] Unfortunately for our purposes, that is exactly what we're trying to find an answer for. The only real option here, exercised by circuit courts already, is to skirt this admonition, as the Fifth and Second Circuits did in *Lopez v. Cintas Corp.* and *Bissonnette v. LePage Bakeries Park St., LLC*,[37] and use the reasoning to extend beyond airline cargo loaders and evaluate the rideshare industry against this standard.

d. *Lopez* gave color to *Saxon's* holding.

The Fifth Circuit evaluated plaintiff Lopez in light of *Saxon's* determination that workers who are "directly involved in transporting goods across state or international borders [fall] within § 1's exemption."[38] Lopez's status as a last-mile delivery driver, the Fifth Circuit held, did not entitle him to *Saxon* protections under the FAA.[39] The court distinguished Saxon's role as an airline cargo loader by arguing that Lopez's taking of items out of a warehouse to a local address does not implicate interstate commerce.[40]

Reasonable minds can differ on whether this was a faithful application of *Saxon*. But it does seem, however, to have drawn a sort of line (though whether such a line is upheld by the Supreme Court should it take up the question is not entirely foreseeable). The implication here is that the person who moves the item from its vehicle of interstate transportation is last in the chain of commerce.

---

[35] *Saxon*, 142 S. Ct. at 1789.
[36] *Id.* at 1789 n.2.
[37] *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022); *Bissonnette*, 49 F.4th 655.
[38] *Saxon*, 142 S. Ct. at 1789.
[39] *Lopez*, 47 F.4th at 432.
[40] The thread, beginning with *Circuit City* in lower courts' rejection of an expanded commerce power echoes here: "the phrase 'engaged in commerce' has 'a more limited reach,' and this narrower reading covers only 'active employment' in interstate commerce." *Lopez*, 47 F.4th at 432 (citing *Circuit City*, 532 U.S. at 115–16).

An analogy may illustrate better. If we were to collate the facts of *Saxon* to *Lopez's* holding, the airline cargo loader is still involved in interstate commerce, but a cargo handler who takes a piece of luggage out of the hands of the airline cargo loader and puts it inside the airport is no longer involved in the interstate commerce. The chain, therefore, breaks at the airline cargo loader. Similarly, if we were to collate the facts of *Lopez's* holding, the truck driver who leaves Oklahoma and enters Texas with goods and puts them into the Texas warehouse is the Saxon airline cargo loader, within the stream of interstate commerce. The last-mile driver, who takes the items out of the warehouse where they are already sitting, is not part of that stream of commerce. Therefore, the chain has broken after the driver dropped the goods at the warehouse.

e. Where do rideshare drivers fit into this equation?

There is less ambiguity here in how courts have decided to define the chain of commerce, and we can conceive of a reconcilable pattern of where to break the chain, at least where goods are concerned: The last person to handle something off of an interstate vessel. Now the question remains of where rideshare drivers are in this chain. Because goods in transit cannot move themselves but passengers can, this question is more complicated than as initially presented.

There are two possible configurations for rideshare drivers within this framework. Either they are analogous to the airline cargo loader contemplated by *Saxon*, who "loads" the passenger into interstate travel by being their last point of contact in their movement before they board the plane[41]; or, they are instead the driver conceptualized in *Lopez*,[42] who simply acts as a point of contact between a passenger who, if being picked up, is already within the ambit of local transit, or if being dropped off, is simply entering a local zone where they will join the stream of interstate travel. Because passengers are capable of moving themselves, unlike goods, whether their drivers fall into a *Saxon* or *Lopez* framework depends on how we choose to interpret the passenger role and the nature of their movement.

Both are reasonable outcomes. However, this comment argues that, where both outcomes are reasonably conceivable, we should prefer an outcome that includes—at the risk of being overinclusive—rideshare drivers as existing within the stream of interstate travel; in other words, the *Saxon* framework should prevail. This is for two main reasons.

First, the passenger movement begins the minute a person gets out of a rideshare driver's car. Their movement was not implicated before and was inextricably linked to, and dependent upon, the driver's actions. If the driver did not appear, in certain especially public transit-poor areas, the ability of the passenger to reach the transportation hub would have been severely limited. Thus, drivers are not merely a tool for the passenger's own existence in the stream of interstate travel; they are an indispensable partner in facilitating the interstate commerce movement and thus should not be cut out of the equation.

Second, as discussed above, we should prefer outcomes that reduce arbitration outcomes for rideshare drivers on policy grounds. Arbitration is a tool that limits the practical ability of drivers,

[41] *Saxon*, 142 S. Ct. at 1789.
[42] *Lopez*, 47 F.4th at 432.

and workers in general, to seek redress for legitimate issues to which they have entitlement to legal remedies. The courts' arguments in the opposite should be evaluated in light of a cost-benefit analysis that looks at comparing the costs of arbitration, which are high, with benefits, which are convenience and administrability, which is difficult to justify when held up to the curbing of rights that arbitration engenders.

2. The unanswered challenge of quantifying interstate commerce.

This section considers how courts have grappled with the question of how to define the line of how much interstate commerce constitutes interstate commerce within the meaning of the statute such that rideshare drivers are exempt from arbitration. How much should drivers be crossing state lines in order to qualify for protection under the FAA? No circuit provides a firm answer. The Ninth and First Circuits take a categorical approach, whereas we see a more case-by-case determination by the Third Circuit.

a. The Ninth and First Circuits did not give a definitive answer on how much interstate commerce must occur to trigger the exemption.

The Ninth and First Circuits engaged in questionable non-line-drawing in defining how much interstate contact constitutes interstate commerce. To the extent that some drivers do cross state lines, the two courts held that such an action is not enough to constitute interstate commerce.[43]

The Ninth Circuit specifically attached numbers to their answer. To the Ninth Circuit, that 10.1% of all rides were to or from airports was immaterial to their ultimate determination of no exemption. The court qualified (maybe misqualified, since the lower court did not add the "only" that the Ninth Circuit includes in its quotation) the 10.1% statistic with the word "only," seemingly minimizing the extent to which we should evaluate the number of airport rides.[44] But Uber data tell us that there were over 6.9 billion Uber rides in 2019 alone,[45] meaning that over 679 million of those rides were to or from airports. While that does not change the proportion of rides conducted to and from airports, such a staggering number means that the Ninth Circuit's seemingly minimizing portrayal of the number of rides to and from airports should be subject to continuing scrutiny.

Both courts also noted that only 2.5% of trips occur across state lines: "Overall, interstate trips, even when combined with trips to the airport, represent a very small percentage of Uber rides, and only occasionally implicate interstate commerce."[46] Interestingly, the Ninth Circuit seemed to reject even some interstate trips counting as interstate: "the record demonstrates that even Uber trips 'that started and ended in different states' are inherently local in nature as 'the average distance was approximately 13.5 miles and the average duration was approximately 30.0 minutes.'"[47] While

[43] *See Capriole*, 7 F.4th 854; see also *Cunningham*, 17 F.4th 244.

[44] *Capriole v. Uber Techs, Inc.*, 49 F. Supp. 3d, 919, 930 (N.D. Cal. 2020).

[45] Press Release, UBER, *Uber Announces Results for Fourth Quarter and Full Year 2019* (Feb. 6, 2020), https://perma.cc/2YTN-RUNA.

[46] *Capriole*, 7 F.4th at 864; *see also Cunningham*, 17 F.4th at 248 (citing *Capriole*, 7 F.4th at 864).

[47] *Capriole*, 7 F.4th at 864.

this may feel like an intuitively correct statement, it directly contravenes the explicit textual mandate of the FAA, which provides exemption protections for any worker engaged in interstate commerce. Nowhere does the statute say that workers who complete too low a percentage of interstate work are no longer exempt.[48] This statutory addition, though not admittedly the solely dispositive factor, is a disturbing and concerning consideration by an appellate court.

Also relevant to this analysis is the First Circuit's treatment of persuasive authority from the Seventh Circuit, which held that, not for the purposes of compelling arbitration but for the purposes of establishing appellate jurisdiction, truck drivers who completed around 2% of their work as interstate workers were under the ambit of the § 1 exception.[49] That court's distinctions hold little water and are not backed by any real distinction between the two sets of facts, however, and the Seventh Circuit's holding should be more seriously considered as a source of potential conflict moving forward instead of dismissed from the inquiry entirely.

First, the court dismissed that holding as inapplicable because not all Lyft drivers have taken a trip interstate, so they are not all engaged in interstate transportation, even at the rate of 2%. Besides this being an entirely arbitrary distinction with no legal backing, such a conclusion, like the problem faced by the Ninth and First Circuits, is arbitrary line drawing. Second, the court falls back on *Circuit City's* narrow reading of exclusion provision in § 1 based on ejusdem generis. However, as discussed above, ejusdem generis's counter in the *Circuit City* holds significant weight that could caution against a reading of the class as narrow in succeeding cases.

b. The Third Circuit took a case-by-case approach to determining whether a driver is engaged in interstate commerce.

The Third Circuit in *Singh v. Uber Techs., Inc.* was decidedly more open to a conclusion that allowed rideshare drivers to litigate instead of arbitrate their claims, though not categorically in the other direction of the Ninth and First Circuits.[50] There is still, in fact, a path to reaching a similar ultimate outcome to that of the Ninth and First Circuits, that rideshare drivers are not exempt from arbitration. The means, however, are different.

The court first outlined a couple of reasons why rideshare drivers *may* be engaged in interstate commerce in response to Uber's objections.[51] Such analysis is not directly relevant to the ultimate determination that rideshare drivers aren't *not* exempt from arbitration. The court held that while not, not exempt, the ultimate decision on FAA applicability to rideshare drivers would be left to district courts who will conduct discovery on individual cases. In this case specifically, the Third Circuit opined that "the pleadings say little about whether the class of transportation workers to which Singh belongs are engaged in interstate commerce or sufficiently related work."[52] This hedged

[48] *See* 9 U.S.C. § 1.

[49] *Cunningham*, 17 F.4th at 252 (citing *Int'l Brotherhood of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 958 (7th Cir. 2012)).

[50] *See Singh*, 939 F.3d at 226.

[51] *See id.* at 221–26.

[52] *Id.* at 226.

holding reflects the court's determination that rideshare drivers should be assessed on a case-by-case basis to determine if their specific behavior constitutes interstate commerce.

c. We should prefer the Third Circuit's case-by-case approach.

The categorical approach engages in near impossible line drawing that ignores the values of protecting rideshare workers' rights to arbitration. Line drawing asks the decision maker to "identify the values they see at stake in a legal problem and to then craft a rule that best protects and advances those values."[53] Thus, when courts tell a number of rideshare drivers that their interstate work is not relevant to an analysis of their right to litigate, it devalues not only their work but the text of the FAA itself. And, where arbitration accomplishes employers' goals of quashing litigation on important workers' issues like wage differentials, benefits, and collective bargaining, the balance of power already swings in the employers' direction. We should prefer an approach that gives at least some power back to workers.

In the current moment, that seems to be a case-by-case approach as per the Third Circuit. That approach leaves open a judicial avenue to ensuring that litigation can be brought fairly. While it is not a complete solution, it still allows for substantial discovery on cases to ensure that any labor violations or other claims that drivers may have are more thoroughly investigated and adjudicated by a member of the judiciary and not an appointed arbitrator.

However, this approach is not without its pitfalls. Discovery on classes will almost certainly affect how a class is drawn, leading to some consternation and balancing problems about how to draw a class of workers that is similarly situated enough to pass Rule 23(b)(3) muster, in which the question of law or fact must be "common to class members" such that the question "predominate[s] over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[54] But the class action must also not increase the costs of discovery so much that bringing the claim is pointless, and the issue ends up being resolved in arbitration regardless. Discovery remains one of the most expensive parts of litigation, a cost that is broadcast as an argument for arbitration. But it is precisely the lack of discovery in arbitration, a problem addressed by the Third Circuit's approach, that presents such a strong impediment to vindicating rideshare drivers' rights.

Another large downside is that this would be an overall inefficient system that would lead to variable outcomes. However, part of the problem outlined above is that a uniform outcome for all rideshare drivers is precisely the problem. Rideshare drivers operate on many different timelines, with significant regional variance, and in different circumstances. A system that acknowledges these significant variations is one that is better able to acknowledge the inability of a general statute like the FAA and its interpretive progeny to govern an industry that is this diverse, unwieldy, and extensive.

[53] Orin Kerr, *Line-Drawing*, 70 J. LEGAL EDUC. 162, 162 (2020).
[54] FED. R. CIV. P. 23(b)(3).

Applicant Details

First Name	**Theodore**
Last Name	**Van Beek**
Citizenship Status	**U. S. Citizen**
Email Address	**t.vanbeek@wustl.edu**
Address	**Address** **Street** **8454 Lincoln Avenue** **City** **Evansvile** **State/Territory** **Indiana** **Zip** **47715** **Country** **United States**
Contact Phone Number	**2016610921**

Applicant Education

BA/BS From	**University of Wisconsin-Madison**
Date of BA/BS	**May 2018**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 20, 2022**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Jurisprudence Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Magarian, Gregory
gpmagarian@wustl.edu
(314) 935- 3394
Hoppenjans, Lisa
lhoppenjans@wustl.edu
3149358980
Cox, Prentiss
coxxx211@umn.edu
(612) 625-6810

References

Judge Richard L. Young - Richard_Young@insd.uscourts.gov (812) 434-6444

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Theodore Van Beek
8454 Lincoln Avenue, Apt. B
Evansville, IN 47715
201-661-0921
t.vanbeek@wustl.edu

June 23, 2023

The Honorable Stephanie Dawkins Davis
U.S. Court of Appeals for the Sixth Circuit
600 Church Street, Room 125
Flint, MI 48502

Dear Judge Davis:

I am writing to apply for a term clerkship in your chambers beginning in 2024. I currently clerk for Judge Richard L. Young in the Southern District of Indiana and graduated from the Washington University School of Law, where I was a senior editor of the *Washington University Jurisprudence Review* and a member of the National Moot Court Team.

From these experiences, I work excellently in the small team that makes up a Judge's chambers. I understand the need to work cooperatively, the need to do the small jobs superbly to make chambers run smoothly, and the need to stay independently in touch with deadlines. I also take great pride in producing consistently superlative legal analysis in high-pressure, fast-paced environments. Accordingly, I think I would be good fit for your chambers.

Enclosed please find my résumé, transcripts, and writing sample. I am the only person who has edited the sample. Additionally, the following individuals are submitting letters of recommendation separately and welcome inquiries in the meantime.

Professor Magarian Washington University School of Law gpmagarian@wustl.edu	Professor Hoppenjans Washington University School of Law lhoppenjans@wustl.edu	Professor Cox University of Minnesota Law School coxxx211@umn.edu

Judge Young, is also serving as reference. He can be contacted at Richard_Young@insd.uscourts.gov or through chambers at (812) 434-6444. I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Theodore A. Van Beek

Theodore Van Beek

8454 Lincoln Avenue, Evansville, IN 47715
(201) 661-0921 | t.vanbeek@wustl.edu

EDUCATION

Washington University School of Law — St. Louis, MO
GPA: 3.92 / 4.00 | Top 5% | Class Rank: 5/221 — 2020 – 2022
Honors and Awards: Magna Cum Laude; Order of the Coif; Honor Scholar; State and Local Government Student Excellence Award; Judge Amandus Brackman Moot Court Award
Achievements: Highest Grade – Remedies (Fall 2021); 2nd Highest Grade – Federal Courts (Fall 2021); Highest Grade – State and Local Government (Spring 2022); Dean's List (2020–2022); 2nd Best Oralist – National Appellate Advocacy Moot Court Regional Tournament; Best Petitioner Brief – Spong Moot Court Tournament
Activities: National Moot Court Team, *Washington University Jurisprudence Review*

University of Minnesota Law School — Minneapolis, MN
GPA: 3.600 / 4.333 | Top Quartile — 2019 – 2020

University of Wisconsin – Madison — Madison, WI
BBA – Finance, Investments, and Banking — May 2018
Activities: Men's Rowing – First Varsity Coxswain

EXPERIENCE

Hon. Richard L. Young, United States District Court — Evansville, IN
Law Clerk — 2022–2024

- Wrote and edited dispositive opinions in a variety of civil and criminal cases.
- Handled cases from filing to final judgment which included writing and editing interlocutory orders and opinions such as motions *in limine* and motions to certify class.
- Prepared Judge Young for temporary restraining order and preliminary injunction hearings, as well as for pre-trial conferences.

First Amendment Clinic — St. Louis, MO
Student Counsel — Spring 2022

- Drafted, edited, and revised a reply brief in an 8th Circuit case regarding the freedom of assembly.
- Argued *Edwards v. City of Florissant* for the appellants in the 8th Circuit.
- Wrote and edited briefs in opposition to motions to dismiss on public records law issues.

Wisconsin Department of Justice — Madison, WI
Law Clerk, Special Litigation and Appeals Unit — Summer 2021

- Drafted a motion to dismiss and supporting brief submitted to the Wisconsin Circuit Court on the grounds that the court lacked competency to hear the case—the court adopted the legal reasoning in the brief.
- Wrote portions of a brief to the Wisconsin Court of Appeals requesting dismissal for violations of the statutory briefing requirements—the court agreed.
- Drafted multiple memoranda on issues including Federal Indian law, questions of statutory interpretation, First Amendment challenges to election law, and Fourteenth Amendment challenges to election law.

Violence Free Minnesota — Minneapolis, MN
Legal Intern — Summer 2020

- Researched and drafted internal memoranda on various legal topics and policy proposals.

University of Minnesota Law School — Minneapolis, MN
Research Assistant for Prof. Prentiss Cox — Summer 2020

- Researched developments in public compensation remedies in civil enforcement actions, including the various proof requirements for disgorgement and restitution in the context of different Federal agencies.

INTERESTS

Classical French cooking, coaching

Washington University in St. Louis

Office of the University Registrar

Record Of: **Van Beek, Theodore**
Student ID Number: 490477

Degrees Awarded:
JURIS DOCTOR MAY 20, 2022
GRADUATED WITH LAW HONORS: MAGNA CUM LAUDE MAY 20, 2022

Transcript Issued 06/15/2022 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2020

PRACTICAL LEGAL WRITING AND ANALYSIS FOR LITIGATORS (PERRY)	LAW	W74 523H	2.0	B+
SPEECH, PRESS & THE CONSTITUTION (RICHARDS)	LAW	W74 609K	3.0	A
INFORMATION PRIVACY LAW (RICHARDS)	LAW	W74 636A	3.0	A+
JURISPRUDENCE REVIEW	LAW	W75 617S	1.0	CR
ADVANCED TOPICS IN FREEDOM OF EXPRESSION SEMINAR (MAGARIAN)	LAW	W76 767S	3.0	A

Enrolled Units 12.0 Semester GPA 3.87 Cumulative Units 42.0 Cumulative GPA 3.87

Spring Semester 2021

ADMINISTRATIVE LAW (LEVIN)	LAW	W74 530A	3.0	A
EVIDENCE (ROSEN)	LAW	W74 547K	3.0	A
LEGISLATION (MAGARIAN)	LAW	W74 601A	3.0	A
THE LAW OF THE FOURTEENTH AMENDMENT (MANDELKER)	LAW	W74 609R	2.0	A+
APPELLATE ADVOCACY (FINNERAN/VANOSTRAN)	LAW	W74 660B	3.0	A-
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
JURISPRUDENCE REVIEW	LAW	W75 617S	1.0	CR

Enrolled Units 16.0 Semester GPA 3.85 Cumulative Units 58.0 Cumulative GPA 3.86

Fall Semester 2021

LAWYER ETHICS (ROSEN)	LAW	W74 561D	2.0	A
REMEDIES (LEVIN)	LAW	W74 567L	2.0	A+
NEGOTIATION	LAW	W74 578K	1.0	CR
FEDERAL COURTS (DROBAK)	LAW	W74 634D	3.0	A+
HEALTH LAW (SACHS)	LAW	W74 707S	3.0	A
JURISPRUDENCE REVIEW	LAW	W75 717S	1.0	CR

Enrolled Units 12.0 Semester GPA 3.99 Cumulative Units 70.0 Cumulative GPA 3.90

Spring Semester 2022

CRIMINAL PROCEDURE: ADJUDICATION (EPPS)	LAW	W74 580T	3.0	A-
FIRST AMENDMENT CLINIC	LAW	W74 604C	6.0	HP
STATE AND LOCAL GOVERNMENT (MANDELKER)	LAW	W74 617	3.0	A+
SUPREME COURT SIMULATION	LAW	W74 806F	2.0	P
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
JURISPRUDENCE REVIEW	LAW	W75 717S	1.0	CR

Enrolled Units 16.0 Semester GPA 3.97 Cumulative Units 86.0 Cumulative GPA 3.92

Keri A. Disch, University Registrar

Washington University in St. Louis

Office of the University Registrar

Record Of: **Van Beek, Theodore**
Student ID Number: 490477

Spring Semester 2022

Remarks

FL2020 FROM: UNIVERSITY OF MINNESOTA LAW SCHOOL ELECTIVE 30.0 UNITS
FL2020 NOTE: TRANSFER IN FROM UNIV OF MINNESOTA: CONTRACTS, TORTS, CIVIL PROCEDURE I&II, CONSTITUTIONAL LAW, PROPERTY, CRIMINAL LAW, LEGAL RESEARCH & WRITING
SP2022 CERTIFICATE GRANTED: CERTIFICATE IN PUBLIC INTEREST LAW

Distinctions, Prizes and Awards

FL2020 DEAN'S LIST
SP2021 DEAN'S LIST
FL2021 DEAN'S LIST
SP2022 HONOR SCHOLAR AWARD
SP2022 DEAN'S LIST
SP2022 JUDGE AMANDUS BRACKMAN MOOT COURT AWARD
SP2022 ORDER OF THE COIF

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

Washington University in St. Louis is accredited by the Higher Learning Commission www.hlcommission.org, and its schools by various professional accrediting bodies. The CEEB code is 6929.

Transcript Nomenclature
Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

Washington University in St. Louis

SCHOOL OF LAW

January 27, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Theodore Van Beek

Dear Judge Davis:

I write to recommend my student Teddy Van Beek, Washington University School of Law class of 2022, to serve as one of your law clerks beginning in the summer or fall of 2022. Teddy has performed extremely well as a law student. He is a highly talented writer, a diligent researcher, and a hard worker. I believe he will make an excellent law clerk and an outstanding attorney.

Teddy transferred to Washington University after a strong start to his legal training at the University of Minnesota. He has excelled here, earning a 3.90 grade average that places him in the top five percent of his class. Interestingly, his grades have improved at every stop on his illustrious academic tour through the University of Wisconsin (B.B.A. in Finance), the University of Minnesota, and now here. Teddy strikes me as a very mature, self-possessed person, but I think he's just now fully coming into his own as a top student. Beyond his academic success, he has distinguished himself as an editor on the Washington University Jurisprudence Review and a member of our national Moot Court team. (Our process for admission to the Law Review unfortunately disadvantages transfer students like Teddy. His grades would have warranted a position there.)

My most sustained exposure to Teddy came two years ago in my advanced First Amendment seminar. The class only had eleven students, and I worked intensively with each student on a substantial research project, so I had a great opportunity to get to know Teddy and his work. He participated judiciously and incisively in class discussion. He chose a very ambitious paper topic, criticizing First Amendment doctrine as improperly value laden and proposing an alternative analytic basis that would weigh more rigidly defined free speech interests against competing claims of right. Not surprisingly, the paper did not persuade me that First Amendment doctrine needs fundamental revision. However, Teddy did an amazing job of cogently critiquing the doctrine across a wide range of particular topics and explaining the appeal of his "rights based" alternative theory. The paper gave me fresh insights into some topics that I've studied and taught about for many years. Teddy performed exhaustive research and carefully addressed counter-arguments. It's just an outstanding piece of legal writing and analysis.

The process of working with Teddy was as enjoyable as his final paper is impressive. He sought me out for advice at several stages. He was consistently excited about probing deeper with his research, refining his style and structure, and developing his ideas as far as he could. He paid attention to my comments and responded to them with intelligence and sensitivity as he revised the paper. He also turned out a remarkably thorough finished product in just a single semester. My sense from our interactions is that Teddy would flourish in the sort of collaborative writing process that tends to characterize judicial clerkships. He also showed me that he can write a lot, and write well, in limited time.

Teddy values public service and policy work. During college he researched health care policy at the Capitol Street consulting firm. He spent his first law school summer at Violence Free Minnesota, researching a range of issues to assist in the operation of domestic violence shelters. During his second summer he worked in the Special Litigation and Appeals Unit in the Wisconsin Department of Justice, gaining experience in brief writing. He has a long-term interest in practicing appellate law. He appreciates both the experiential value of a clerkship for his legal training and the importance of contributing to judicial work.

When Teddy isn't immersed in law, he loves to cook, with an emphasis on the Escoffier style of French cuisine. He's especially proud of his sauces. Listening to him talk about cooking is great fun. He thrives on the creativity of the process and the opportunities that French cuisines in particular offer for improvisation and variation – at what stage to add salt to a tomato-based sauce, how finely or coarsely to chop onions. I can hear in his musings on food the same curiosity and drive that produced such a substantial seminar paper.

Teddy will bring the judge who hires him a strong combination of legal talent, maturity, and enthusiasm. I respectfully urge you to give him your most serious consideration.

Best,

/s/

Gregory P. Magarian
Thomas and Karole Green Professor of Law

Gregory Magarian - gpmagarian@wustl.edu - (314) 935- 3394

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

May 12, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Theodore Van Beek

Dear Judge Davis:

I am writing to provide my highest recommendation in support of Theodore Van Beek's clerkship application.

I direct the Washington University School of Law First Amendment Clinic, which represents clients in matters implicating the rights of free speech, press, and assembly or statutory rights of access to public records. Teddy was the standout student in the clinic this spring and is the most impressive student I have worked with in my six semesters directing the clinic. He is an enthusiastic and tireless worker, a strong researcher and writer, and an exceptional oral advocate.

Teddy spent more than 300 hours (significantly more than the clinic's requirements) working on clinic matters last semester, so I have a strong basis on which to evaluate his capabilities and work product. Teddy drafted briefs in opposition to successive motions to dismiss in a state public records law case, was a primary drafter of a reply brief in a case before the Eighth Circuit, and represented our clients before the Eighth Circuit with an extremely impressive performance in a difficult oral argument.

Teddy is a thorough researcher and a strong and clear writer. He goes above and beyond in thinking through all possible ways to support or attack an argument and exhausts every research trail. He came to all our meetings well prepared and with answers to every question. He is organized, adheres to deadlines, and understands the importance of getting the both the big and little things right. Importantly, Teddy is also a pleasure to work with. He's passionate about the practice of law and was determined to always provide the very best work product possible. He was a generous and gracious teammate, and I witnessed how other students in the clinic benefitted from his assistance and review of their work. He is also a very skilled oral advocate, with an exceptional ability to recall cases and their details.

For these reasons, Teddy was selected to represent our clients in oral argument before the Eighth Circuit in a case involving challenging First Amendment and due process arguments. Teddy amazed both me and our co-counsel with his incredible preparation and case recall, thoughtful responses to questions during moots, and ability to immediately incorporate feedback into the following run-through of his argument. The three attorneys who participated in these moots (myself included) were simply blown away by his abilities and preparation.

As a former law clerk to the Hon. Susan H. Black of the Eleventh Circuit Court of Appeals and a former partner at a St. Louis boutique litigation firm, Dowd Bennett LLP, I understand what is required to be a successful clerk and successful young lawyer. Teddy has all of the traits and skills to be an outstanding addition to your chambers, and I give him my strongest recommendation without hesitation.

If you have any questions regarding Teddy's application, please do not hesitate to contact me.

Best,

/s/

Lisa S. Hoppenjans
Director, First Amendment Clinic
Assistant Professor of Practice

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

UNIVERSITY OF MINNESOTA

Twin Cities Campus

Law Clinics
Law School

190 Mondale Hall
229-19th Avenue South
Minneapolis, MN 55455

612-625-5515
Fax: 612-624-5771

March 26, 2021

Dear Judge:

I am writing to recommend Theodore Van Beek for a federal court judicial clerkship.

Mr. Van Beek served as my research assistance last summer after he completed his first year of law school at the University of Minnesota. He worked on finding and analyzing the case law related to awards of restitution and disgorgement in public enforcement actions. Specifically, he looked at federal agencies commonly obtaining this type of relief, including the CFPB, SEC and FTC. His research was incorporated into an article that will be published in the *Yale Journal of Regulation.*

In short, Mr. Van Beek was among the two or three best RAs that I have had in my sixteen years in the legal academy. His research was thorough and he writes well. His work was especially noteworthy for two reasons.

First, he conducted the research with an eye toward the purpose, and displayed excellent judgment in sorting through the cases to find discussions in opinions that were most relevant to the questions I was trying to answer. If I had to point to one deficiency of most importance and most common in law student work, it is the inability to separate noise from signal. Mr. Van Beek had a maturity of thinking on this score that was unusual.

Second, Mr. Van Beek presented the material in a well-organized manner. His outline of his various results was easy to follow. It was also concise, which is consistent with my earlier point about his ability to focus on the most relevant matter.

Because we work together on a project over the summer rather than just in a large class, I got to know Mr. Van Beek a bit. He is very responsive and an easy person with whom to communicate. He is obviously very interested in pursuing a legal career; eager in an appealing way. As a former long-ago federal judicial clerk, I know that all judicial chambers are small and you want a clerk who will be an enjoyable presence. Mr. Van Beek more than fits that bill.

Let me know if you have any questions or want to talk further.

Sincerely,

Prentiss Cox
Professor of Law

Writing Sample – Theodore Van Beek

8454 Lincoln Avenue, Evansville IN 47715
(201) 661-0921 | t.vanbeek@wustl.edu

This writing sample is an appellate brief I prepared for an appellate advocacy class in the spring of 2021. I was assigned and wrote for the appellee and the case "occurred" in the Eighth Circuit. Accordingly, the full brief met all of the Eighth Circuit's local rules as well as the FRAP. Additionally, no other person has edited this work. This excerpted portion defends a conviction from an ineffective assistance of counsel claim on § 2255 review. Specifically, the defendant's attorney had not read a Supreme Court case that would likely have dismissed one of the three counts against the defendant. Without knowledge of that case, the defendant, Mr. Worthy, pled guilty to that count and now alleges ineffective assistance of counsel for his attorney's failure to investigate and raise the case.

The party names are fictional, and the original brief is 29 pages long. As such, I have excluded the cover page, the summary of the case and request for oral argument, the table of contents, the table of authorities, the jurisdictional statement, the statement of issues, the statement of the case, the summary of the argument, section II of the argument, the conclusion, the signature block, the certificates, and the appendices for the sake of brevity. A copy of the writing sample in its entirety is available upon request. Thank you for your consideration.

ARGUMENT

I. JEFFERSON'S COUNSEL MET THE CONSTITUTIONAL STANDARD

Under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel is only deficient when the defendant proves that: (1) counsel fell below an objective standard of reasonableness judged by prevailing professional standards, and, (2) this failure prejudiced the defendant.

In Worthy's view, Jefferson's conduct "fell outside the wide range of professionally competent assistance[,]" because Jefferson did not read *United States v. Skilling*, 561 U.S. 358 (2010). *Allen v. United States*, 829 F.3d 965, 967 (8th Cir. 2016). Not so. As explained below, because Jefferson "heard" of *Skilling*, "knew what [*Skilling*] was all about[,]" and still believed that *Skilling* was "not directly" applicable to the case, (R. at 52, 56), his conduct did not fall outside "prevailing professional norms[.]" *Strickland*, 466 U.S. at 690.

A. Standard of Review

The two prongs of *Strickland* "are mixed questions of law and fact." *Strickland*, 466 U.S. at 698. While this Court reviews the district court's conclusion *de novo* and reviews predicate facts for clear error, *Reed v. United States*, 106 F.3d 231, 236 (8th Cir. 1997), the standard for judging counsel is "a most deferential one," *Harrington v. Richter*, 562 U.S. 86, 105 (2011). And because that "highly deferential" standard asks whether "counsel's performance fell outside the wide

range of professionally competent assistance[,]" *Allen*, 829 F.3d at 967, "[s]urmounting *Strickland's* high bar is never an easy task," *Harrington*, 562 U.S. at 105.

Additionally, because an "ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture[,]" this Court must take "scrupulous care" to avoid deciding waived and defaulted issues that would "threaten the integrity of the very adversary process the right to counsel" protects. *Id.* at 105.

B. Jefferson Acted Within Professional Standards of Competence

Jefferson understood *Skilling*, believed it did not benefit Worthy, and made a strategic decision that nullified the need for an exhaustive investigation of the case. Jefferson therefore acted within the "wide range of professionally competent assistance." *Haney v. United States*, 962 F.3d 370, 373 (8th Cir. 2020) (quoting *Allen*, 829 F.3d at 967).

While counsel has a duty to understand the law and "thorough[ly]" investigate when they are unsure, *Slocum v. Kelley*, 854 F.3d 524, 533–34 (8th Cir. 2017); *see also Wiggins v. Smith* 539 U.S. 510, 524–27 (2003), there is no obligation to investigate when the attorney has "no reason to believe [it] would be useful or helpful," *Langston v. Wyrick*, 698 F.2d 926, 932 (8th Cir. 1982).[1] For example, an

[1] While this Court decided *Langston* before the Supreme Court's decision in *Strickland*, it uses the same standard. *See Langston*, 698 F.2d at 932 (requiring (1) customary skills of a reasonably competent attorney and (2) material prejudice).

attorney's failure to investigate two witnesses who the defendant believed would impeach trial testimony was not ineffective assistance because the attorney did not have reason to believe the testimony would be helpful. *Id.* at 932.

And exhaustive investigations are unnecessary when counsel employs a strategy that "mak[es] particular investigations unnecessary." *Cullen v. Pinholster*, 563 U.S. 170, 197 (2011). In *Cullen*, for example, there was no need for counsel to conduct an exhaustive investigation of the defendant's background: counsel had adopted a "family-sympathy" strategy rather than a defendant-focused strategy. *Id.* at 195–97. Nor does counsel need to conduct exhaustive investigations into the defendant's family members when the attorney believes there is little benefit because "reasonable professional judgments support the limitations on counsel's investigation." *United States v. Ngombwa*, 893 F.3d 546, 553 (8th Cir. 2018) (cleaned up).

Here, because Jefferson knew the law and believed further investigation would be unhelpful, his counsel was not constitutionally deficient. Jefferson "knew what [*Skilling*] was all about." (R. at 56).[2] With that understanding, he doubted that "pushing a marginal argument about *Skilling* would have produced a better outcome[,]" and believed *Skilling* did not require the dismissal of count one. (R. at

[2] This testimony is unrebutted. If Worthy were to argue that Jefferson did not understand *Skilling*, this Court reviews that unrebutted fact for plain error. *See Reed*, 106 F.3d at 236.

53, 55). Under that belief, Jefferson could not have acted incompetently because he "had no reason to believe" *Skilling* "would be useful or helpful." *Langston*, 698 at 932.

Also buoying that conclusion is that there was no need to exhaustively investigate *Skilling*: Jefferson adopted a conciliatory strategy to "attempt to negotiate a favorable disposition at sentencing[.]" (R. at 50). This strategy came about not only because of Jefferson's 23 years of experience, but also because of the facts of the case and the disposition of the sentencing judge. (R. at 48, 50). Indeed, because an argument to dismiss that relied on *Skilling* "would have meant losing the war[,]" by adding an additional 27 months to Worthy's sentence, Jefferson's deliberate and informed strategic decision to "negotiate a favorable disposition" instead of motioning to dismiss the first of three counts rendered an exhaustive investigation unnecessary. (R. at 33–34, 52–53). Accordingly, because Jefferson thought *Skilling* would be unhelpful in relation to the agreed-upon strategy, "reasonable professional judgments support the limitations on counsel's investigation[,]" and Jefferson's counsel was not ineffective. *Ngombwa*, 893 F.3d at 553 (cleaned up).

Worthy's remaining contention is that because Jefferson did not read *Skilling*, his counsel must be *per se* deficient. Yet, Worthy cites no case for that contention. Jefferson may have deviated from best practices, but that is not the test. *Haney*, 962 F.3d at 373 ("The question is whether an attorney's representation amounted to

incompetence under 'prevailing professional norms,' not whether it deviated from best practices[.]"). Without alternative authority, this Court "strongly presume[s]" Jefferson "rendered adequate assistance." *Pinholster*, 563 U.S. 170, 189 (2011).

C. Even if Jefferson Was Incompetent, Worthy Cannot Show Prejudice Because He Cannot Show He Would Have Insisted on Going to Trial

As established above, Worthy cannot show Jefferson's "performance fell outside the wide range of professionally competent assistance." *Allen*, 829 F.3d at 967. But even if Jefferson acted incompetently under prevailing professional norms, Worthy cannot show prejudice because he cannot establish a "reasonable probability that but for" Jefferson's incompetence he would have rejected a guilty plea and insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

To satisfy the prejudice requirement in cases involving pleas, the defendant must show "a 'substantial,' not just 'conceivable,' likelihood[,]" *Pinholster*, 563 U.S. at 189, that "but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. For example, an error in informing the defendant of proper sentencing guidelines does not prejudice the defendant when the defendant does not demonstrate or allege they would have rejected *a* plea, rather than *the* specific plea. *Covington v. United States*, 739 F.3d 1087, 1090 (8th Cir. 2014). Further bolstering that conclusion is when the government agrees to dismiss additional counts because of the plea. *Id.*

Yet bare and conclusory statements by the defendant are not, by themselves, sufficient to support a finding of prejudice. *See Tran v. Lockhart*, 849 F.2d 1064, 1067 (8th Cir. 1988) (explaining defendants must show "specific facts" showing they would not plead guilty). For example, an allegation that the defendant would have rejected a guilty plea if informed of the availability of a certain defense "is insufficient" because it is merely a "bare assertion." *United States v. Frausto*, 754 F.3d 640, 644 (8th Cir. 2014). Even allegations that a motion to dismiss would be successful are not sufficient to establish prejudice, provided that counsel would recommend a guilty plea even if the motion were successful. *See Roberson v. United States*, 901 F.2d 1475, 1478–79 (8th Cir. 1990).

Here, Worthy does not demonstrate he would have rejected a plea. While he alleges the proceedings would be different, that is insufficient for pleas. *Covington* requires the defendant to allege *and* demonstrate they would reject a guilty plea and Worthy does not do so. He does not cite the record once for the proposition that he would have rejected a guilty plea and, thus, cannot carry his burden showing he would reject a guilty plea. *See* Appellants Br. 6–8. Nor does Worthy demonstrate an insistence to go to trial: much the opposite, he repeatedly insists there would be no trial. (R. at 58, 59, 61 ("No, I wouldn't go to trial.")). But just like *Covington*, because the United States only agreed to dismiss counts two and three because of the plea, the only way for there to be no trial was for Worthy to plead guilty. (R. at

7). As a result, Worthy cannot point to "specific facts" that demonstrate he would have gone to trial and any alleged incompetence is necessarily non-prejudicial. *Tran*, 849 F.2d at 1067.

While Worthy alleged at the evidentiary hearing—rather than his brief—that he would not have accepted the specific plea if he was aware of *Skilling*, (R. at 59), this "bare assertion" is insufficient to create prejudice, *Frausto*, 754 F.3d at 644. Even Worthy's contention that the district court would dismiss count one before trial if Jefferson argued from *Skilling* is not sufficient to establish prejudice. That is because, just like *Roberson*, Jefferson would have recommended accepting a plea even if a motion to dismiss were successful. (R. at 53); *see Roberson*, 901 F.2d at 1478–79 (holding a failure to show counsel would not have recommended a guilty plea even if pretrial motions were successful renders the alleged incompetence non-prejudicial). In his view, "[i]t simply wasn't worth it" to go to trial because the result would be worse for Worthy even with a successful motion. (R. at 53–54). Hence, because Worthy cannot point to any evidence that demonstrates a substantial likelihood that but for Jefferson's incompetence, he would have rejected *a* guilty plea rather than *the* specific guilty plea and insisted on going to trial, there is no prejudice.

Worthy focuses on *Skilling's* application and whether *Skilling* required the dismissal of count one. But this Court's scope of review is narrow for § 2255

ineffective assistance claims. *Harrington*, 562 U.S. at 105 (explaining "an ineffective-assistance claim can so easily function as a way to escape rules of waiver and forfeiture" which narrows the court's scope of review for § 2255 claims). *Skilling* only matters "to the extent it relates to the reasonableness of counsel's performance." *Fields v. United States*, 201 F.3d 1025, 1027 (8th Cir. 2000). Here, because Worthy procedurally defaulted the *Skilling* issue,[3] "it is not for [this Court] to decide at this stage of the case" whether *Skilling* demands the dismissal of count one. *Id.* at 1027. Resolving that question on the appellant's proposed ground would be the exact kind of "intrusive post-trial inquiry" that this Court must avoid. *Strickland*, 466 U.S. at 690. The issue of prejudice revolves solely around whether Worthy "would not have pleaded guilty and would have insisted on going to trial[,]" not whether *Skilling* would successfully dismiss count one. *Hill*, 474 U.S. at 59.

[3] Neither party disputes Worthy has procedurally defaulted the issue of whether *Skilling* would dismiss the first count. R. at 62.

WRITING SAMPLE

Theodore Van Beek
8454 Lincoln Avenue, Evansville, IN 47715
201-661-0921 | t.vanbeek@wustl.edu

This writing sample is a mock Supreme Court brief on appeal from the fictional "Fourteenth Circuit" that I prepared for a moot court competition in the Fall of 2021. I was assigned and wrote for the respondent. While the final product contained work and edits from teammates, the work here is entirely my own.

The case concerned whether 42 U.S.C. § 12182 (part of Title III of the ADA) applies to commercial websites. By its terms, § 12182 applies to "place[s] of public accommodation." The various circuits have split over whether a commercial website can be a "place of public accommodation." This case involved a blind plaintiff, Ms. Albert, suing a candy store because their website, Neptune.shop, was not compliant with Title III of the ADA. This excerpt argues the purpose of the statute, enacted in 42 U.S.C. § 12101, and the legislative intent indicate that § 12182 applies to commercial websites. For brevity, I have omitted the first section that argued that the unambiguous meaning of "place" does limit the term "place of public accommodation" to physical spaces. A copy of the writing sample in its entirety is available upon request. Thank you for your consideration.

ARGUMENT

I. NEPTUNE.SHOP IS A PLACE OF PUBLIC ACCOMMODATION

In creating the ADA, Congress used broad, flexible language to create an expansive list of 12 categories of public accommodation that cannot "discriminate[] . . . on the basis of disability[.]" 42 U.S.C. § 12182. These expansive categories effectuate "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Accordingly, the statutory categories "should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001) (internal quotations omitted).

With this background in mind, Neptune.shop is a "place of public accommodation" that is prohibited from discriminating "on the basis of a disability[,]" for three corroborating reasons. 42 U.S.C. § 12182. First, the text of the ADA unambiguously elucidates that a place of public accommodation includes websites like Neptune.shop. Second, even if the text of Title III were ambiguous, the purpose and structure of Title III confirms that Title III applies to commercial websites. Third, no other construction of the statute can effectuate the intent of Congress to allow the ADA to evolve with changing technology. Thus, Neptune.shop is a place of public accommodation within the meaning of the ADA and this Court should affirm the judgment for Ms. Albert.

* * *

B. Even If Title III Were Not Clear, the Purpose and Structure of the ADA Confirms That Neptune.shop Is a Place of Public Accommodation

As established above, § 12182 unambiguously applies to commercial websites like Neptune.shop because commercial websites are places of public accommodation. But even if

that conclusion were not plain from the text of Title III, it is still compelled by the purpose and structure of the Act. The Fourteenth Circuit gave short shrift to Congress' purpose in enacting the ADA. In their view, because "[t]he District Court [found] no indication of congressional intent that Title III should apply to websites[,]" the statute does not apply to websites. R. at 9. Yet, as explained below, not only has this Court directly contradicted that view, *see Bostock*, 140 S. Ct. at 1751 (noting the Court has long held and "emphatically" explained that "whether a specific application was anticipated by Congress is irrelevant"), but the courts also "cannot interpret federal statutes to negate their own stated purposes" regardless of Congress' intent, *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420 (1973). And because the ADA's express purpose is to "eliminate" all discrimination against people with disabilities, § 12101(b)(1), only a reading that applies Title III to commercial websites "produces a substantive effect that is compatible with the rest of the law[,]" *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988).

Ultimately, as "[a] fair reading of legislation demands a fair understanding of the legislative plan[,]" *King v. Burwell*, 576 U.S. 473, 498 (2015), which, here, is "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[,]" § 12101(b)(1), and the usage of expansive categories to effectuate that purpose, the ADA must be construed to effectuate that plan instead of construed to "thwart the obvious purpose of the statute[,]" *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965).

i. The ADA can only create a "clear and comprehensive" regime to eliminate discrimination by applying to commercial websites

Because the Petitioner's construction—that commercial websites are not places of public accommodation—allows the very discrimination that Congress purposed the ADA to "eliminate," § 12101(b)(1), the Petitioner's construction is "untenable in light of [the statute] as a

whole[,]" *Dep't of Revenue of Ore. v. ACF Indus.*, 510 U.S. 332, 343 (1994), and commercial websites are, thus, places of public accommodation under § 12182.

This Court first looks to identify a purpose from the statute's text. *See Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 648 (1990) (using statutory text in a "purpose clause" to determine purpose); *see also Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1908 n.4 (2019) (plurality) (explaining the importance of "confining [purpose] inquiries to the statute's terms"). Subsequently, this Court will empower the statute to effectuate that stated purpose, *see Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (reading statute to effectuate the enacted purpose), and to remedy "[t]he evil which Congress sought to check[,]" *United States v. Shirey*, 359 U.S. 255, 261 (1959). In *King v. Burwell*, for example, the Court was "compel[led] . . . to reject petitioners' interpretation because it would . . . likely create the very 'death spirals' that Congress designed the Act to avoid." *King*, 576 U.S. at 492. The same is true in the ADA context where this Court rejected a construction that would allow places of public accommodation to treat disabled people differently because that result "would be inconsistent with . . . [the Act's] expansive purpose." *PGA Tour*, 532 U.S. at 680.

Here, the express purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]" § 12101(b)(1). That purpose is necessary because "many people with physical or mental disabilities have been precluded" from "fully participat[ing] in *all* aspects of society[.]" § 12101(a)(1) (emphasis added). Thus, the "evil which Congress sought to check[,]" *Sirey*, 359 U.S. at 261, with the ADA is discrimination against disabled persons in every facet of society, not just physical spaces. Accordingly, the ADA must be construed to "eliminat[e]" discrimination which prevents disabled persons from "fully participating in all aspects of

society[,]" § 12101, in order to avoid "thwart[ing] the obvious purpose of the statute[,]" *Brown*, 380 U.S. at 571.

The ADA can only effectuate that purpose by applying Title III to commercial websites like Neptune.shop because any other construction would allow discrimination in some facet of society, particularly on the internet. Ms. Albert is unable to order candy from the website, to use the store locator, to navigate the site properly because it failed to interact with her screen-reading software, to provide feedback to Neptune regarding their candy and website, to receive coupons in the same way a non-disabled person could, and to visit the Westridge store because the website is not accessible to her. R. at 4–5. A construction that does not subject commercial websites to Title III, prevents Ms. Albert—a permanently blind disabled person, R. at 2—from participating in this aspect of society. Yet, the statute's purpose does not have carve outs that exempt the virtual aspects of our society from the anti-discrimination provisions of the ADA. Just as in *King*, were this Court to exempt commercial websites from Title III, it would create the exact evil that Congress designed the Act to remedy: disabled persons would be unable to fully participate in all aspects of society. That result would be "inconsistent with . . . [the Act's] expansive purpose" and cannot stand. *PGA Tour*, 532 U.S. at 680.

The Fourteenth Circuit did not have the opportunity to engage with these materials because it improperly gave weight to "Congress's longstanding inaction on this issue." R. at 9. This Court has emphatically rejected that approach and noted that that is a "particularly dangerous basis on which to rest an interpretation of an existing law." *Bostock*, 140 S. Ct. at 1747 (2020). Indeed, there is no authority that explains why Congress did not act; the court below merely assumed that inaction meant Congress did not intend to apply Title III to the internet. Yet perhaps Congress already thought that Title III applied to websites. Or perhaps a

busy Congress did not consider the issue at all: there is not even a committee report indicating Congress gave this topic any consideration. Congress's failure to speak on this issue gives no indication contrary to the express purpose stated when Congress passed the law. *See Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (explaining the Court construes enacted laws rather than bills that have failed).

ii. Congress's chosen structure of using exemplary categories to define public accommodations confirms Title III applies to commercial websites

The choice of Congress to construct Title III using exemplary categories bolsters the conclusion that Title III of the ADA applies to commercial websites. Because "statutes must be read as whole[,]" *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 135 (2007) (internal quotations omitted), the chosen structure of the act affects the act's purpose and can confirm a particular construction. *See King*, 576 U.S. at 492. So where a construction countermands the very structure of the act, that construction cannot stand. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252 (2010) (rejection construction that creates "an absurd result" given the structure of the act). That is because Congress "does not alter fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Thus, where the statute's structure provides a list of examples to define a term, those examples do not themselves create an exception because that construction defeats the purpose of using examples in the first instance. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002); *accord Bostock*, 140 S. Ct. at 1747 (discussing the "canon of donut holes").

Congress constructed the ADA to define "public accommodation" with a list of examples rather than a traditional definition to create a flexible and expansive statute that uses comparison rather than a mechanical application of geographic rules. *See* § 12181(7)(E). The purpose of

using examples instead of a definition "reflects an intentional effort to confer the flexibility necessary to forestall . . . obsolescence[,]" *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), by allowing the act to apply where a new entity is sufficiently similar to the statutory category. Put differently, Congress chose this specific structure so that the examples could be "construed liberally" and would be sufficiently broad to cover unforeseen circumstances. *PGA Tour*, 532 U.S. at 661. The categories are not supposed to allow defendants to take advantage of the "canon of donut holes" by arguing that their entity is not listed and is thus excluded. *Bostock*, 140 S. Ct. at 1747. Accordingly because Congress created expansive and broad categories and chose not to create any exceptions, "courts must apply the broad rule." *Id.*

The structure of Title III, therefore, indicates that § 12182 applies to commercial websites because those fall within the broad statutory category in § 12181(7)(E) by being substantially similar to traditional sales establishments. For example, both Neptune.shop and the retail store sell Neptune candy; both have normal and specialized candies; consumers can buy memorabilia and souvenirs from both the retail store and Neptune.shop; and both stores ship candy from the same place: the Westridge plant. *Cf.* R. at 3, R. at 4. There is also no question that the retail store is a place of public accommodation. R. at 18. Put differently, Neptune.shop and Neptune's retail store conduct the same sales business. And because the only way to effectuate Congress's chosen structure is to apply § 12182 when two entities—one which falls within a § 12181(7) category—function the same way, § 12182 applies to Neptune.shop.

Were this Court to read the categories in § 12181(7) as imposing a "physical" limitation on § 12182, Congress' chosen structure would be frustrated because Congress chose not to include any exceptions to the § 12181(7) categories. Section 12182's broad rule covers everything that is substantially similar to a § 12181(7) example—including commercial websites.

Had Congress wanted to prevent the statute from applying to new technologies and new ways of doing business, it would have done so by creating an exception to its broad and flexible categories not by requiring courts to read in non-textual exceptions based on a lack of express text covering websites. *See Bostock*, 140 S. Ct. at 1747 (noting exceptions are only created through text rather than by a failure to speak directly on a specific case). Yet, it did not. In petitioner's view, Congress made its "clear and comprehensive national mandate[,]" against discrimination "in all aspects of society," §12101(a–b)(1), turn on words like "place" and on Congress's failure to expressly include websites in the statute. Not so. Title III's structure makes the opposite clear; the categories must be construed liberally—without exception—and expand to cover commercial websites that engage in the same business as a brick-and-mortar sales establishment.

C. No Other Construction Effectuates the Dual Intent of Congress of Allowing the ADA to Evolve With Changing Technology And Eliminating Discrimination Against Those With Disabilities

The intent of Congress to allow the ADA to evolve with changing technology and to effectively end discrimination against disabled persons further confirms that Title III applies to commercial websites like Neptune.shop. Where there is still doubt after looking at the text and purpose of the enacted statute, the legislative history may clarify ambiguity, *see, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), or help avoid absurdity, *see, e.g.*, *NLRB v. The Cath. Bishop of Chi.*, 440 U.S. 490, 504–06 (1979) (considering construction that impinged on religion clauses to be absurd); *see also City of Arlington v. FCC*, 569 U.S. 290, 309–10 (2013) (Breyer, J., concurring) (collecting examples). While some reject the usage of legislative history entirely, *see Hirschey v. FERC*, 777 F.2d 1, 6–8 (D.C. Cir. 1985) (Scalia, J., concurring), legislative history is still valuable where it is particularly clear and unambiguous,

see Pierce v. Underwood, 487 U.S. 552, 566–68 (1988) (Scalia, J.) (using House committee report). Where this Court looks to legislative history, "the authoritative source" is the committee report which "respresen[ts] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal quotations omitted).

As explained below, because the ADA's committee reports are abundantly clear that the intent of the ADA is to apply to new technologies, Congress expressed an intent to eliminate discrimination against disabled persons in regard to new technology. Accordingly, because commercial websites are new technology in relation to the passage of the ADA, Title III applies to those websites.

i. The ADA could not change with new technology unless the language were broad enough to apply to new technologies

Congress intended the ADA to be "future driven," and give non-disabled populations the "benefit[s] from advancing technology." S.Rep. No. 101-116, p. 73 (1989). For example, the House report expressly noted that "the types of accommodation . . . under all titles of this bill, should keep pace with the rapidly changing technology of the times." H.R.Rep. No. 101-485, pt. 2, p. 108 (1990). Meanwhile, the Senate report discussed that because "hearing- and speech-impaired communities should be allowed to benefit from advancing technology[,]" all titles of the ADA should "not seek to entrench current technology but rather to allow for new, more advanced, and more efficient technology[,]" S.Rep. No. 101-116, at 78. And while the Senate's remarks were in the context of Title IV, they apply with equal force to Title III and Congress' intent to future proof the "types of accommodation." H.R.Rep. No. 101-485, at 108. Most importantly, however, there was no dissent on the intent to future-proof the ADA; the only dissents discussed the vagueness and breadth of defined terms. *See generally*, H.R.Rep. No.

101-485, pt. 3, p. 92–94 (1990) (arguing "disabled" definition too vague); *see also* H.R.Rep. No. 101-485, pt. 4, p. 80–83 (1990) (arguing "disabled" definition too broad).

The only way for the "types of accommodation" to "keep pace with the rapidly changing technology of the times[,]" is to require commercial websites to follow § 12182's general rule because they are places of public accommodation. By focusing the statute on the future, Congress intended to apply Title III to any new technology which might discriminate against disabled persons including commercial websites. Indeed, were this Court to exempt commercial websites, it would "entrench current [as of 1990] technology[,]" S.Rep. 101-116, at 78, by allowing newer technologies, like commercial websites, to treat disabled persons differently from their non-disabled peers, R. at 4 (discussing Ms. Albert's unique difficulties with the website as compared to a non-disabled person). Not only would that result create a judicially made competitive advantage for commercial websites—a result this Court has sought to avoid; *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018)—but it would also directly countermand the intent of Congress. Accordingly, a commercial website is a place of public accommodation under § 12182.

Contrary to suggestions that Congress did not intend to apply Title III to the internet because "the internet was in its infancy[,]" R. at 9, Congress was aware of the internet before the passage of the ADA, *see* H.R. Rep. 101-398 (1990) (discussing use of a computer virus to hack internet websites in 1989); *see also* H.R.Rep. 101-419 (1990) (same). And while Title III does not contain express language applying § 12182's general rule to websites, it does contain sufficiently broad language to effectuate the intent to apply § 12182 to commercial websites. Therefore, because Congress knew about the internet and because Congress intentionally created a statute intended to apply to "advancing technology[,]" S.Rep. 101-116, at 78, which necessarily

includes new applications of the internet, Congress intended "all titles" of the ADA to apply to new technology like commercial websites, H.R.Rep. No. 101-485, at 108.

Applicant Details

First Name	**Sruthi**
Last Name	**Venkatachalam**
Citizenship Status	**U. S. Citizen**
Email Address	**sruthi.venkatachalam@yale.edu**
Address	**Address** **Street** **4580 Royal Birkdale Dr** **City** **Westerville** **State/Territory** **Ohio** **Zip** **43082**
Contact Phone Number	**7409728284**

Applicant Education

BA/BS From	**Case Western Reserve University**
Date of BA/BS	**May 2020**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 31, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Law and Policy Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Morris Tyler Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kronman, Anthony
anthony.kronman@yale.edu
203-432-4934

Siegel, Reva
reva.siegel@yale.edu
203-432-6791

Hathaway, Oona
oona.hathaway@yale.edu
203-436-8969

References

Dave Schulz:
Floyd Abrams Lecturer in Law and Senior Research Scholar in Law
MFIA Clinic Supervisor
Phone Number: 203-436-5827
Email: david.schluz@yale.edu

Noah Messing:
Lecturer in the Practice of Law and Legal Writing
Phone Number: 203-436-8111
Email: noah.messing@yale.edu

Ruth Coffey:
Lecturer in Law (spring term) and Senior Research Scholar in Law
Email: ruth.coffey@yale.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sruthi Venkatachalam
4580 Royal Birkdale Dr.
Westerville, OH 43082
sruthi.venkatachalam@yale.edu
740-972-8284

The Honorable Judge Stephanie Davis
U.S. Court of Appeals for the Sixth Circuit
600 Church Street
Flint, MI 48502

Dear Judge Davis:

I graduated from Yale Law School in 2023, and I wish to apply for a clerkship in your chambers for the 2024-2025 term or any term thereafter. Between 2023-2024, I will be working in the Washington, D.C. office of Skadden, Arps, Slate, Meagher & Flom LLP in the National Security Practice Group.

As an Ohio native, I have a strong interest in clerking on the Sixth Circuit and serving the community where I was raised.
I am particularly keen on clerking in your chambers given your experience as an Assistant U.S. Attorney. As a lawyer with aspirations to work in a U.S. Attorney's Office, I would welcome the opportunity to work with a judge whose experience aligns with own professional interests.

I have enclosed a resume, law school transcript, undergraduate transcript, two writing samples, and list of recommenders. Professors Oona Hathaway, Anthony Kronman, and Reva Siegel have submitted letters of recommendation on my behalf. I am happy to provide any additional information you might require. Thank you for your consideration.

Sincerely,

Sruthi Venkatachalam

SRUTHI VENKATACHALAM
sruthi.venkatachalam@yale.edu | 740-972-8284 | she/her/hers
127 Wall St., New Haven, CT, 06511

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D., May 2023
Activities: Yale Law and Policy Review, *Executive Development Editor*
Just Security, *Student Staff Editor*
National Security Group (NSG), *VP of Scholarship*

CASE WESTERN RESERVE UNIVERSITY (CWRU), Cleveland, OH
M.A., Military Ethics, May 2020
Honors: CALI Award in International Law (Highest grade in International Law Fall 2019 at CWRU Law School)
Thesis: Torture as Mala in Se and Rapport Based Interrogations as a Superior Model

B.A., Statistics and B.A., International Studies, May 2020, *summa cum laude*
Honors: Phi Beta Kappa, Webster Godman Simon Award for Excellence in Mathematics (awarded to one BA candidate annually), Dean's High Honor List

EXPERIENCE

COKER FELLOW IN CONSTITUTIONAL LAW Fall 2022
Fellow for Professor Kronman. Instructed a group of first year students on the fundamentals of legal writing and critiqued their briefs by providing substantial feedback on interpretations of case law and effective legal advocacy. Mentored first year students by advising them on navigating law school and developed group camaraderie.

SKADDEN, ARPS, SLATE, MEAGHER, & FLOM Summer 2022
Washington DC Office Summer Associate. Drafted memoranda in support of the national security and litigation practice groups on issues relating to the Eighth and Fourteenth Amendments, consumer financial protection, and AI technology. Analyzed case law and conducted statutory analysis related to FCRA and federal preemption of New York state laws.

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC Fall 2021 – Fall 2022
Student Clinician. Advocated for algorithmic accountability in the Connecticut state legislature and testified to the Connecticut Advisory Board for the U.S. Commission on Civil Rights on the intersection between algorithms and civil liberties. Litigated First Amendment issues in state and federal court for FOIA and defamation suits.

JUDGE VICTOR A. BOLDEN, U.S. DISTRICT COURT, DISTRICT OF CONNECTICUT Spring 2022
Legal Extern. Assisted chambers in the preparation of judicial orders and opinions by conducting legal research, writing legal memoranda, and drafting sections of orders for a range of civil and criminal cases on the judge's docket.

PROFESSOR REVA SIEGEL, YALE LAW SCHOOL Winter 2021 – Spring 2022
Research Assistant. Conducted extensive research and wrote memoranda on constitutional law issues relating reproductive justice, suspect classification based on wealth in the Warren Court, and the emergence of originalism.

U.S. DEPARTMENT OF JUSTICE, PUBLIC INTEGRITY SECTION Summer 2021
Summer Intern. Researched and drafted memoranda on novel legal issues such as those arising from emerging technologies, civil procedure, evidentiary question, statutes of limitations, and the effects of recent U.S. Supreme Court developments, drafted prosecution memoranda, and drafted motions for ongoing litigation.

FEDERAL BUREAU OF INVESTIGATION May 2018 – March 2020
D.C. Headquarters Honors Intern; Cleveland Field Office Honors Intern. Provided tactical support, program management, and analytical insights for cases in FBI's Counterterrorism Division and High Value Detainee Interrogation Group.

SKILLS AND INTERESTS

Brazilian Jiu Jitsu, Muay Thai, Classical Violin, Baking, Statistical Analysis, R and R Studio, STATA, MATLAB

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 02

Record of: Sruthi Priyal Venkatachalam Page: 1
Issued To: Sruthi Venkatachalam
Parchment Document ID: TWB2OSBK

Date Entered: Fall 2020

Degree Awarded : Juris Doctor 31-MAY-2023

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2020					
LAW	10001	Constitutional Law I Section B	4.00	CR	R. Siegel
LAW	11001	Contracts I Section A	4.00	CR	S. Carter
LAW	12001	Procedure I Section A	4.00	CR	H. Koh
LAW	14001	Criminal Law & Admin I Grp 3	4.00	CR	J. Whitman
		Term Units 16.00 Cum Units 16.00			
Spring 2021					
LAW	21024	Cyberlaw, Policy, and Politics	1.00	CR	O. Hathaway
LAW	21277	Evidence	4.00	H	S. Carter
LAW	21722	StatutoryInterpretReqState	3.00	P	W. Eskridge
LAW	30246	Policing, Law,andPolicy Clinic	3.00	H	T. Meares, T. Tyler, J. Camacho
LAW	40001	Supervised Research	1.00	H	P. Gewirtz
LAW	50100	RdgGrp:Law and Ethics Big Data	1.00	CR	J. Balkin
		Term Units 13.00 Cum Units 29.00			
Sup. Research: Just Security Writing Fellowship.					
Fall 2021					
LAW	20011	Sentencing	3.00	P	J. Gleeson
LAW	20170	Administrative Law	4.00	H	C. Jolls
LAW	20219	Business Organizations	4.00	H	J. Macey
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, D. Dinielli, S. Baron, N. Guggenberger, J. Borg, J. Balkin, S. Stich
		Term Units 15.00 Cum Units 44.00			
Spring 2022					
LAW	21068	Antitrust	4.00	H	G. Priest
Supervised Analytic Writing					
LAW	21763	International Law	4.00	H	O. Hathaway
LAW	21784	Intelligence Law	2.00	H	O. Hathaway, R. Litt
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, S. Shapiro, D. Dinielli, S. Baron, N. Guggenberger, J. Borg, J. Balkin, S. Stich
LAW	40001	Supervised Research	2.00	CR	C. Jolls
Substantial Paper					
		Term Units 16.00 Cum Units 60.00			
Fall 2022					
LAW	20366	Federal Courts	3.00	H	A. Steinman
LAW	20557	Torts and Regulation	3.00	H	D. Kysar
LAW	30212	International Arbitration	2.00	H	M. Friedman
LAW	30218	Advanced Written Advocacy	3.00	H	N. Messing
LAW	50100	RdgGrp:Repro Justice Lawyering	1.00	CR	A. Miller
		Term Units 12.00 Cum Units 72.00			

********** CONTINUED ON PAGE 2 **********

YALE LAW SCHOOL

Office of the Registrar

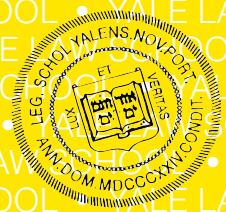
TRANSCRIPT RECORD

YALE UNIVERSITY
Date Issued: 02-JUN-2023

Record of: Sruthi Priyal Venkatachalam
Level: Professional: Law (JD)

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
Spring 2023					
LAW	21017	Property	4.00	H	T. Zhang
LAW	21217	Crim Procedure: Adjudication	3.00	P	P. Shechtman
LAW	21258	ComparativeCrimLawFairTrials	2.00	H	R. Coffey
LAW	30193	ProsecutnExtrnshp&Instruction	3.00	H	K. Stith, M. Donovan, J. Francis, H. Cherry S. Garbarsky
		Term Units 12.00	Cum Units	84.00	

********** END OF TRANSCRIPT **********



YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to you on behalf of Sruthi Venkatachalam, a third-year student at the Yale Law School. Sruthi will graduate this spring, after a most distinguished career at the Law School. She has applied for a clerkship in your chambers. Sruthi has my enthusiastic support.

Last fall, Sruthi was one of two Coker Fellows assisting me in teaching my class in constitutional law. Constitutional law is one of four courses that first-term students at Yale are all required to take. My class was what we call a “small group”—a seminar-sized class of sixteen. Each first-term student takes one of his or her required classes in a small-group format. The idea is to allow for more conversational interaction and to give students the opportunity to develop a closer relation with one of their professors. Those teaching small groups are allowed to choose two third-year students to assist them. I had more than sixty applicants for my two Coker positions. Sruthi was one of the two I chose. I was thrilled that I did.

Over the course of the term, and then after, Sruthi and I met often to discuss matters pertaining to the small group. Sometimes the issues were procedural or even personal. When should we schedule a make-up class? What is the best day to plan an outing to Block Island, where I live in the summer and fall? How is this or that particular student doing? Are there any reasons to be concerned?

Sometimes the issues were substantive. What is the best way of introducing students to the ins and outs of the Commerce Clause, and how can the cases from Gibbons to Sibelius be most effectively used as a window into (some of) the complexities of American federalism? Which of the many school desegregation cases that followed Brown are the best ones to illustrate the dimensions of the problem and the Supreme Court’s shifting perspective(s) on it?

On the personal side, Sruthi was unfailingly wise and kind. She knew what our students needed and how best to help them. It is not an exaggeration to say that by the end of the term, they all loved her. She was always available; always understanding; always clear in her directions and advice. My first-term students could not have had a better third-year friend.

On the substantive side, my many, many conversations with Sruthi were invariably stimulating and helpful to me. Sruthi has a first-rate mind. She thinks with uncommon clarity and range. When I spoke with her about the cases on our syllabus, she always had a sure grasp of their details, down to the molecular level, and a highly intelligent, often imaginative, understanding of their implications. I do not have a shadow of a doubt that Sruthi could have taught the course herself. I would have enjoyed being her student.

Toward the end of the term, the students were required to brief and argue a case then before the Supreme Court (303 Creative v. Eleni). Sruthi and her co-Coker chose the case; worked intensively with each student in the class on his or her brief; and joined me on the bench for the oral arguments in the final week of the semester.

The briefs were uniformly excellent. In part, this was the result of the effort and intelligence the students themselves put into their work. But I know to a certainty that the briefs would not have been nearly as good, or the arguments as forceful, if Sruthi had not devoted weeks of her time to helping the students write and prepare. They all recognized this and at our farewell dinner, joined in a raucous and sustained round of applause for their two magnificent Cokers.

Everything I have seen of Sruthi—and I have seen a great deal—leads me to believe, with utter confidence, that she will be a splendid law clerk. Sruthi is brilliant; hardworking; punctual; warm-hearted and generous of spirit. What else could a judge want? What else could anyone want? If Sruthi joins you in your chambers, you will be as pleased with your decision as I have been with mine to ask her to be my Coker Fellow last fall.

Sincerely,

Anthony Kronman

Anthony Kronman - anthony.kronman@yale.edu - 203-432-4934

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to draw to your attention Sruthi Venkatachalam, recent graduate of Yale Law School who is applying for a clerkship in your chambers. Sruthi has complied a distinguished academic record, acquired practice experience in national security, and has externed for Judge Victor Bolden in the district court of the District of Connecticut.

Sruthi delivered a strong performance in my introductory constitutional law course her first year. In her second year she served as a research assistant and was totally devoted in the role. She worked on several projects. Most were historical in focus. One project examined how Burger Court decisions on wealth inequality evolved in the 1970s for which Sruthi did archival work. Another project involved research into the social movement roots of “reasons bans” on abortion (prohibiting abortion on the basis of race or sex or disability). She has also researched the Meese Justice Department’s early involvement in originalism in the 1980s. Sruthi helped proof the manuscript of my recent article The Politics of Memory. Sruthi did meticulous work on each of these projects. While none of these projects involved writing a memo on a question of law, I can report that Sruthi mastered all the work I assigned her, and delivered with energy and engagement.

It has been a great pleasure to work with Sruthi. As her resume suggests, she is interested in practicing in national security and has sought to acquire skills and experience that would prepare her. My experience with Sruthi suggests that she brings that sense of purpose to every pursuit. She is smart, responsible, and precise in handling research assignments and is full of enthusiasm and curiosity of a kind that I think would make her a valuable assistant in chambers, whether working independently or in teams.

Please call me at 203-661-6181 if I can be of further assistance in your decision.

Sincerely,

Reva Siegel

Reva Siegel - reva.siegel@yale.edu - 203-432-6791

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to highly recommend Sruthi Venkatachalam for a clerkship in your chambers.

Sruthi grew up in the Columbus, OH area, the daughter of Indian immigrants. She attended Case Western Reserve University, where excelled, earning a BA in Statistics and International Studies summa cum laude and an MA in Military Ethics. She came to Yale Law School after working for nearly two years at the FBI.

I got to know Sruthi as a student in two classes—International Law and Intelligence Law, both of which she took in Spring 2022. In International Law, a large course, Sruthi was a regular participant in class, and she wrote a very strong exam, for which she received an H. In Intelligence Law, a seminar that I co-taught with Bob Litt, former General Counsel at the Office of the Director of National Intelligence, Sruthi wrote two essays. The first evaluates the current case law on the use of the official acknowledgement doctrine to rebut the Glomar response (a response to a request for information that will "neither confirm nor deny" the existence of the information) and argues that a broader, more expansive reading of the doctrine is more in line with the purpose of the doctrine and with the Freedom of Information Act. The second paper examines the Augmenting Intelligence using Machines strategy being deployed to incorporate artificial intelligence into the intelligence community. It explores the transparency issue in artificial intelligence and the dilemma it poses for the intelligence community, and it proposes integrating mandatory impact assessments into the existing oversight regime to help overcome this challenge. Both essays were extremely well researched and very well written, and she again received an H for the course. (On the second, Bob wrote that he learned from it—which is high praise, as he is as informed in this area as anyone in the country.) The writing skill she demonstrated in the class gives me confidence that Sruthi would be an excellent law clerk. This is further reinforced by her work at Just Security, where she has been a senior student editor—a very competitive position given only to students who demonstrate excellent writing and editing skills.

After clerking, Sruthi is interested in pursuing a career in public service. As I mentioned at the outset, she worked for almost two years at the FBI. In her summers during law school, she gained further experience as an intern at the Department of Justice in the Public Integrity Section and as a Summer Associate at Skadden Arps. She has also worked as an extern for Judge Victor Bolden, which has given her valuable insight into legal practice. These experiences have prepared her to be an excellent law clerk.

For these reasons, I highly recommend Sruthi for a position as a law clerk. If you have any questions, please contact me at oona.hathaway@yale.edu, or by phone at 203-436-8969 or via my cell at 203-343-8482.

Sincerely,

Oona A. Hathaway
Gerard C. and Bernice Latrobe Smith Professor of International Law

Sruthi Venkatachalam
Writing Sample
Advanced Written Advocacy Assignment Four

This brief was written for the final assignment in Advanced Written Advocacy.

The basic factual premise is as follows:
F.M., a minor who attends Boston Collaborative High School (BCHS), posted a short video on TikTok. In the video, she says "I wish we were still on summer break. If just one of you would call the school and threaten to shoot a few teachers the next day, we'd get the day off. And if someone would make that threat every night, we'd never need to go to school." She then laughed and did a TikTok dance-move. F.M. did not identify which school she attended in the video. She did not specify where she lived, but her username, "BostonFaith," indicated her location. Many of her followers were also BCHS students who recognized her as their classmate. Another student at the school, whose mom was a math teacher at BCHS, saw the video and shared it with his mom. She then forwarded a copy of the video to the school's principal, Ruth Tran.
The following day, Principal Tran called F.M.'s mother to state that F.M. had made threatening remarks and would be suspended for two weeks, effective immediately. F.M. filed a motion for a TRO to block the suspension.

This assignment is an appellate argument briefing the issue of whether a TRO should be granted. We were told only to address the substantive issue of whether the plaintiff would succeed on the merits of securing a TRO. The assignment assumes that another attorney would brief whether a TRO could be appealed on interlocutory appeal. This sample covers one factor of the TRO analysis, the likelihood of success on the merits.

This brief supports the position of BCHS and the City of Boston. It follows a lower court decision where the BCHS succeeded on the merits and F.M. appealed the ruling.

INTRODUCTION

This case concerns Boston Collaborative High School's ("BCHS") obligation to create a secure environment for its students and staff. Such a responsibility requires BCHS to impose sensible and proportionate punishments on those who threaten that environment. F.M., a BCHS student, created a video on the popular social media site TikTok in which she suggested students should make threats against teachers to force school cancellations. J.A. 35. Upon being made aware of the TikTok, BCHS' principal Ruth Tran ("Tran") suspended F.M. for two weeks for her "threatening remarks." J.A. 36.

F.M. filed a motion for a temporary restraining order ("TRO") to halt the suspension. J.A. 23-33. In her motion, the Plaintiff argued the school's actions infringed upon her First Amendment rights. J.A. 27-33. The district court rejected this argument. It noted that speech like F.M.'s video is "plainly within the realm of speech schools *can* and *should* act upon" while the failure to do so may be "grossly irresponsible." J.A. 45 (emphasis added). The plaintiff filed a timely interlocutory appeal seeking to reverse the lower court opinion. J.A. 52-70.

The motion should not be granted since the Plaintiff has failed to prove a likelihood of success on the merits. The Plaintiff's arguments are wrong as a matter of law. Schools have the authority to regulate speech, like F.M.'s TikTok, that would "materially and substantially interfere" with school activities. *See Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 514 (1969). The fact this speech occurred off-campus in no way alters the conclusion. The Supreme Court, too, has emphasized that in matters of school discipline, judges must give deference to school administrators. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Col. Of Law v. Martinez*, 561 U.S. 661, 686 (2010). For these reasons, the Defendants respectfully request that this Court affirm the district court's judgement and uphold F.M.'s suspension.

STATEMENT OF FACTS

School gun violence occurs with unfortunate frequency and is one of the most serious threats school administrators face. On January 7, 2023, a six-year old boy shot a teacher in his elementary school. Livia Albeck-Ripka & Eduardo Medina, *6-Year-Old Shoots Teacher at Virginia Elementary School*, N.Y. Times, Jan. 11, 2023. On May 24, 2022, a former student of Robb Elementary School in Uvalde, Texas murdered nineteen students and two teachers. Rick Rojas & Edgar Sandoval, *The Excruciating Echo of Grief in Uvalde*, N.Y. Times, Aug. 8. 2022. Since 1999, over 331,000 children from 354 schools have been directly impacted by school shootings. John Woodrow Cox et.al, *School Shooting Database*, Wash. Post, Jan. 9. 2023. Administrators must be vigilant to ensure their school is not the scene of the next tragedy. It is with this knowledge that Tran acted.

F.M. is a 17-year-old student at BCHS. She maintains a public TikTok profile, BostonFaith, where she posts short videos. J.A. 1. She has more than 500 followers, including all twenty-three of her classmates and dozens of other BCHS students. J.A. 2-3. On November 1, 2022, F.M. posted a video on her TikTok where she said, "I wish we were still on summer break. If just one of you would call the school and *threaten to shoot a few teachers* the next day, we'd get the day off. And if someone would make that threat every night, we'd never need to go to school." J.A. 34-35 (emphasis added). She then laughed and did a TikTok dance move. J.A. 34-35.

Another student at BCHS, whose mom is a math teacher at the school, was alarmed by the video. In a declaration he submitted, he stated:

> I didn't think that F.M. was seriously going to threaten the school, but she sent it out to everyone. I can't say the same for every other kid at this school who saw the video. It wouldn't be a huge deal except F.M. did essentially talk about people threatening a school shooting. I felt like I had to warn my mom because I'd rather be safe than sorry. I didn't want to feel like I could have done something if the worst happened, and someone took it too far.

J.A. 5. Based on these concerns, he passed the video along to his mom, who reported the video to Tran. J.A. 5.

Principal Tran watched the Tiktok and was alarmed. It had been viewed over 200 times, with several users commenting on the content. J.A. 13-14. One TikTok user, commented "TOTALLY! Gonna [sic] do Burcham[1] first, maybe our test will get cancelled or we'll get a sub or something." J.A. 14. Another user, commented "PLEASE. I'll call today, whos [sic] doing tomorrow? Tran is going to FREAK." J.A. 14. Later investigations revealed that these comments were posted by two BCHS students.

Tran responded to the TikTok with standard procedures. Under §5.2 of the Student Handbook, BCHS holds a strict "zero tolerance policy" towards "any act, threat, or suggestion of violence against BCHS, teachers, students, or any member of the BCHS community." J.A. 4. Tran correctly determined that F.M.'s video constituted a threat of violence to the school's teachers and that F.M. had violated §5.2 of the Student Handbook. On November 2, 2022, Tran called F.M.'s mother to inform her that F.M. had made "threatening remarks against the school community" and that, as a result, F.M. was suspended for two weeks, effective immediately. J.A. 36.

LEGAL STANDARD

Courts must weigh four factors when considering whether to grant a TRO: the likelihood of success on the merits, whether the plaintiff will suffer irreparable harm if relief is denied, a comparison between harm to the plaintiff if preliminary relief is not granted and harm to the defendant if the relief is granted, and the effect of the preliminary relief on the public interest. *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020).

[1] Joanna Burcham is a math teacher at BCHS high school.

The likelihood of success on the merits is the "main bearing wall" of the test. *Corporate Techs., Inc. v. Harnett,* 731 F.3d 6, 9 (1st Cir. 2013). To demonstrate a likelihood of success, plaintiffs must establish more than a "mere probability of success;" instead, they must show a "strong likelihood they will prevail." *Sindicato Puertorriqueno de Trabajadores v. Fortuno,* 699 F.3d 1, 10 (1st Cir. 2012).

This Court reviews the grant or denial of a TRO for abuse of discretion. *Jean v. Mass. State Police,* 492 F.3d 24, 26 (1st Cir. 2007). Separately, findings of law when determining the likelihood of success on the merits are reviewed *de novo*. *OfficeMax, Inc. v. Levesque,* 658 F.3d 94, 97 (1st Cir. 2011).

ARGUMENT

1. The plaintiff failed to prove a substantial likelihood of success on the merits.

The Plaintiff has not proved a substantial likelihood of success on the claim that BCHS violated F.M.'s First Amendment rights. To the contrary, the court below correctly denied the Plaintiff's motion for a TRO. First, F.M.'s TikTok video falls within the exception the Supreme Court articulated in *Tinker* since the video could reasonably be foreseen to disrupt school activities. Second, the Plaintiff's argument that BCHS cannot regulate off-campus speech, like F.M.'s TikTok, fails. The Supreme Court has recognized schools may impose proportionate and reasonable punishment on certain kinds of off-campus speech, like F.M.'s TikTok. Finally, courts have held school administrators should be given deference in their disciplinary decisions.

A. F.M.'s TikTok video was reasonably foreseen to substantially disrupt school activities.

Students do not lose their constitutional rights at the "schoolhouse gate." *Tinker,* 393 U.S. at 506. Yet First Amendment rights may be limited "in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988). School

officials may restrict student speech if they reasonably "forecast substantial disruption . . . of school activities." *Tinker*, 393 U.S. at 514.

Courts analyze all facts known to the administrator at the time of discipline to determine whether they acted reasonably. *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d. 12, 31 (1st Cir. 2020). Given the school's policy on speech threatening the school community and the public nature of the TikTok, Principal Tran reasonably determined that F.M.'s speech would cause substantial disruptions of school activities.

Content advocating for threats upon a school's campus implicates legitimate security concerns. A school has a duty to maintain safety on school grounds. *See Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007). BCHS takes this responsibility seriously and maintains a "zero-tolerance policy" for threats or suggestions of violence against any member of the school community. J.A. 4. Tran assessed that F.M. violated this policy. F.M. not only suggested threats of violence, but actively encouraged it. She directly targeted the school community by asking others to "threaten to shoot a few teachers." J.A. 36.

This violation would result in a substantial disruption of school activities. The school administrative guidelines hold that the school must enter a Level Two Lockdown whenever there is a violation of the zero-tolerance policy. J.A. 15-22. At a minimum, that would involve closing the school entrance and exits, requiring students to remain in their classrooms during class and lunch periods, informing the local police station to send two patrols to the school, informing all the students' parents, addressing any calls or concerns parents have, cancelling any events both during and after school for that day, and consulting with the local police department and superintendent's office to take any other steps deemed necessary. J.A. 18-22.

Tran was familiar with these policies and knew that they would be applied without

exception. The national concern of school shootings and gun violence only lend support to the reasonableness of her actions. See *LaVine v. Blain Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001) (noting the importance of context and emphasizing the national concern around school shootings in assessing the school's reasonableness). Given the unfortunate frequency of school gun violence, the zero-tolerance policy was strictly enforced by BCHS. Thus, Tran reasonably foresaw the chain reaction that F.M.'s TikTok would create, resulting in substantial disruption of school activities.

It is widely accepted that school administrators may punish individuals who threaten the school environment. While the First Circuit has yet to address whether schools may suspend a student who threatened the school community, other circuits have consistently upheld such penalties. For instance, in *Wisniewski v. Board of Education*, the Second Circuit upheld the suspension of a student for threatening conduct. In that case, a student had sent an I.M. message with an icon "depicting and calling for the killing of his teacher." 494 F.3d 34, 38 (2007). While administrators determined that the student had no truly violent intent, Court concluded that, for this conduct, "*Tinker* affords *no* protection against school discipline." *Id.* at 39 (emphasis added).

Similarly, in *Wynar v. Douglas County School District*, the Ninth Circuit upheld a suspension for a student who threatened teachers on a MySpace page. 728 F.3d 1062, 1065 (2013). The Ninth Circuit decided that, considering the violent nature of the message, "school officials have a duty to prevent the occurrence." *Id.* at 1070. The court held it was reasonable to take the student's message seriously because "the harm described would have been catastrophic if it occurred." *Id.* at 1071. Therefore, it was reasonable school would be disrupted as "considerable time" would be dedicated to the fallout. *Id.* Other circuits have ruled in the same way. *See, e.g.*, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d, 379, 393 (5th Cir. 2015) (noting a "paramount need" to address threats against the school community).

The Plaintiff argues that the suspension is unreasonable because of the TikTok's context. She argues that F.M. is a high performing student with no disciplinary record or history of behavioral issues, suggesting she would be unlikely make threats. J.A. 60-61. Furthermore, she claims F.M. was clearly joking, noting the laughter and dance in the video as well as the "ludicrous" suggestion that someone would call in a threat every single day. J.A. 62-65. The Plaintiff argues these elements make it difficult to believe that anyone would take her seriously so forecasting a substantial disruption to school activities was unreasonable. J.A. 67. Both of these responses fail.

To start, being a high performing student is not a license to encourage classmates to threaten teachers. Courts have upheld a school's disciplinary action as reasonable even when the student was a well-regarded member of the school community. *Doninger v. Niehoff*, 527 F.3d 41, 44-45 (2d Cir. 2008) (upholding a Student Council leader's punishment for a vulgar blog post concerning school administrators). Moreover, whether F.M., individually, would threaten teachers misses the point. She posted on a public TikTok account. She actively encouraged and solicited threats. Her statements were for a broader audience. The issue is not just whether F.M. is inclined to act on her words; rather, whether any viewer might also be inclined. The potential scope of the threat poses a greater problem to BCHS. Even if it were *known* that F.M. was not a threat, her actions created more than two hundred *unknowns*, because each person who saw her video might have called in a threat. The school does not know how her followers, including dozens of BCHS students, will respond. Given both the violent subject matter and the scope of the issue, Tran reasonably predicted the school would take serious measures, disrupting daily activities.

The alleged "joking nature" of the video, suggested by laughter and dancing, is also immaterial. Even if F.M. intended the video to be a joke, her intent is irrelevant. *See Norris ex rel. A.M.*, 969 F.3d at 25 (citing *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113 (2d Cir.

2012)). The only relevant inquiry is whether there was a reasonably foreseeable disruption to the school based on her speech. *Id.* There are several cases where courts have held that even if a student's threats against the school community were meant as jokes, the school's disciplinary action was appropriate. *See, e.g.*, *Wynar*, 728 F.3d at 1066 ("We do not discredit [the student's] insistence he was joking; our point is that it is reasonable for Douglas County to proceed as though he was not.").

Furthermore, the Plaintiff's argument betrays a misunderstanding of the medium of TikTok. The mere presence of dancing and laughter does not suggest that no one would take F.M.'s words seriously. TikToks frequently juxtapose serious messages with comedic elements. *See, e.g.*, Frankie Lantican, *A TikTok Trend Has People Sharing Traumatic Experiences to a Pop Song*, Vice, Dec. 7, 2020. The dancing and laughter alone do not make it clear F.M. was joking.

Moreover, even if it would be unreasonable to believe a student would call in a threat every day to cancel school forever, it is reasonable to believe that students may call in a threat at least one time. Some of the comments to F.M.'s TikTok named specific teachers to target while others expressed strong enthusiasm. J.A. 13-14. At least one student feared that threats would be called to the school. J.A. 5. Therefore, it was reasonable for the school to believe that at least one threat may be called, requiring disruptive actions.

Principal Tran was aware of all of the above facts. When making her decision, she reasonably foresaw that F.M.'s solicitation of threats would disrupt the school. These facts indicate that the Plaintiff has not demonstrated a strong likelihood she will prevail on the merits.

B. F.M.'s TikTok video is within the range of off-campus activity that BCHS can regulate.

The Supreme Court has held that schools can regulate some off-campus behavior. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021). The Plaintiff argues that schools

cannot regulate this kind of off-campus speech. J.A. 68. The District Court rejected Plaintiff's claim. J.A. 47-50. The District Court held that, while there is no First Circuit standard for when a school can regulate off-campus speech, it would be "faulty" if schools cannot regulate speech like F.M.'s. J.A. 47. In fact, the District Court noted that "if schools *can* regulate some forms of off-campus speech, speech like F.M.'s must plainly be within the school's ambit." J.A. 50.

The District Court's analysis is bolstered by the fact that many of the reasons the *Mahanoy* Court used to caution against off-campus speech regulation do not apply to this case. The Supreme Court noted that courts should be skeptical of attempts to regulate off-campus speech since it would amount to constant regulation of a student's speech. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2047. Particularly for "political or religious speech," the school has a "heavy burden" to justify judicial action. *Id.* This case, however, does not involve political or religious speech. It involves a student expressing they do not wish to attend school and encouraging others to threaten teachers to cancel school. The fear of constant regulation is also mitigated by the fact the F.M.'s speech is directly addressing and targeting the school, implicating their direct interest. Not all speech would be expected to do the same, so a fear of constant regulation would be unwarranted.

The *Mahanoy* Court also highlighted a school's duty to protect unpopular ideas and facilitate the "marketplace of ideas." *Id.* While a pivotal part of a school's educational mission, "the marketplace of ideas" is not implicated here. If F.M. had expressed an unpopular opinion about gun violence, public schools, or any school policy, it would be a different matter. But that was not the case. At most, she expressed a view that vacation is better than school. While she is free to express that view, it did not result in her suspension. Rather, Tran's concern was F.M.'s call for students to make threats. The "educational" value of F.M.'s statement does little to diminish the school's interest in her call for threats on teachers.

These factors suggest that it would be appropriate to regulate F.M.'s TikTok. While neither the *Mahanoy* Court nor the First Circuit have outlined the limits of off-campus speech schools can regulate, the four circuits have crafted rules to determine whether a school's off-campus regulation of student speech is appropriate. Under any of these standards, BCHS would be permitted to suspend F.M. for her TikTok.

The Fourth Circuit, for instance, held that where "speech has a sufficient nexus with the school," school administrators can regulate off-campus speech. *Kowalski v. Berkely Cnty. Sch.*, 652 F.3d 565, 577 (2011). The court held that a MySpace page dedicated to harassing and bullying another student could be grounds to suspend a student. *Id.* Despite the fact the webpage was created off-campus, the speech could "reasonably be expected to reach the school or impact the school environment." *Id.* at 573. The student also knew that the "fallout from her conduct and the speech within the [MySpace page] would be felt by the school itself." *Id.* All of these concerns apply with equal force to the present case. F.M. posted a public TikTok to an account over eighty of her classmates follow. She understood that her audience included her classmates and it was reasonable that the consequences of her conduct would be felt by the school community, especially if one student elected to call in a threat. Her solicitation of threats against the school community and the audience the message was delivered to establish a nexus to the school, satisfying the Fourth Circuit rule.

Both the Second and Eighth Circuits have held schools can regulate off-campus speech that would fail the *Tinker* test and if it is reasonable that the speech will reach the school community. In *Doninger v. Niehoff*, the Second Circuit held that a disruptive blog posting about a school activity "was reasonably foreseeable . . . to reach school property." 527 F.3d 41, 50 (2d Cir. 2008). F.M.'s TikTok meets this standard as well. A TikTok, targeting the school community and

sent to those in the school community, would foreseeably reach the school. Similarly, in *S.J.W. v. Lee's Summit R-7 School District*, the Eighth Circuit upheld a student's punishment for their vulgar blogsite mocking black students and discussing fights at the school. 696 F.3d 771, 773 (8th Cir. 2012). The court held that the "posts were directed at [the school]" and "could reasonably be expected to reach the school or impact the environment." *Id.* at 778. Under this standard, Tran's actions were permissible.

Finally, the Ninth Circuit, while not creating a broad rule, held that at the minimum, "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Wynar*, 728 F.3d at 1069. On its face, F.M.'s TikTok meets this standard. She created an identifiable threat of school violence by actively calling for others to make threats against the school. And, as previously established, her TikTok would foreseeably cause substantial disruption to the school. Under the Ninth Circuit rule, Tran thus acted appropriately and lawfully by suspending F.M. for her actions.

The Plaintiff argues that the school's interest in F.M.'s off-campus speech is diminished because it is not apparent that she is referring to BCHS. As was the case in *Mahanoy*, F.M. "appeared outside school hours from a location outside the school" and she "did not identify the school in her posts." *Mahanoy Area Sch. Dist.*, 141 S.Ct. at 2046. This argument fails since, unlike in *Mahanoy*, F.M.'s audience understands that she is referring to BCHS. Her profile is followed by all her classmates and dozens of other students at her school. J.A. 1-3. In the past, F.M. has also posted several other TikTok's from inside BCHS or referring to BCHS. J.A. 6-12. So, even if not immediately apparent, it was apparent to her audience which school community she was referencing. Her followers' implied understanding is enough to implicate the school's concern since it was plain to her viewers that she intended threats to be called to BCHS. Thus, the off-

campus nature of F.M.'s speech does not affect the BCHS' ability to punish her for it.

C. This Court should provide deference to Tran's decision to suspend F.M.

The Supreme Court has repeatedly held that courts should provide deference to the decisions of school administrators. Understanding the unique position of school administrators, the Court has "cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Col. Of Law v. Martinez*, 561 U.S. 661, 686 (2010). In fact, the Court has made clear that the public education system "*relies* necessarily upon the discretion and judgement of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (emphasis added).

Thus, courts should respect the role of school administrators and defer to administrators' decisions on student speech so long as the judgement is "reasonable". *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d. 12, 31 (1st Cir. 2020). Given F.M.'s active call for threats against the school, the public medium, and the concerning nature of the threats, Tran acted reasonably by forecasting disruption at the school and suspending F.M.

CONCLUSION

For the preceding reasons, the Plaintiff has failed to demonstrate a likelihood she will succeed on the merits. For that reason, the lower court decision should be affirmed.

Sruthi Venkatachalam
Writing Sample
Moot Court Brief

This brief was written for the Morris Tyler Moot Court in Fall of 2022.

The case assigned was *Wilson v. Houston Community College System*, a case evaluating the constitutional merits of a legislative censure. Wilson filed a lawsuit under 42 U.S.C. § 1983 claiming the legislative censure violated his free speech rights under the First and Fourteenth Amendments.

For the Moot Court competition, each competitor was assigned a position of either petitioner or respondent. This brief was written in support of the petitioners, Houston Community College System.

As per the competition rules, the brief had a limit of 6500 words.
Competitors were not permitted to consult any documents filed in the court docket or any secondary literature published after January 1, 2020. We were permitted to reference the lower court opinions.

For this sample, I have omitted several sections, including the Opinions Below, Statement of Jurisdiction, Constitutional and Statutory Provisions, and Summary of Argument. Sections III and IV of the Argument section have also been omitted for the sample.

1

STATEMENT OF THE CASE

A. Factual Background

Houston Community College ("HCC") is an open-admission, public institution committed to providing an affordable education to the community. In November 2013, David Wilson ("Wilson") was elected to the Houston Community College System's Board of Directors ("Board"). *Wilson v. Hous. Cmty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020). From the start, he was a controversial figure.

Wilson's election was marked with deceit. Wilson achieved national notoriety after he implied he was Black to win in a largely Black, liberal district, despite being a conservative, White candidate. Tal Kopan, *White Candidate Implied He Was Black*, Politico (Nov. 11, 2013). In mailers to voters, Wilson also claimed that he was endorsed by Ron Wilson, a Black state representative from Houston. *Id.* While the flier suggested a respected, local politician had endorsed Wilson, Wilson was referring to an entirely different man: his cousin, also named Ron Wilson. *Id.* When asked about the misleading statement, Wilson defended himself by claiming "[e]very time a politician talks, he's out there deceiving voters." *Id.*

Throughout his tenure, Wilson's divisive behavior set him against his colleagues and members the HCC community. Brittany Britto, *Controversial HCC Board Member Resigns, Announces New Candidacy*, Hous. Chron., (Aug. 27, 2019). His anti-LGBTQ views and rhetoric garnered strong criticism from other board members and HCC students. Alyssa Foley, *Trustee Called Out for Anti-LGBT Rant, Again*, The Egalitarian (Mar. 11, 2017) (noting criticism against Wilson's claim that the inclusion of sexual orientation and gender identity in the HCC anti-discrimination policy was "fascism, not freedom"); John Wright, *LGBT Students Seek to Oust*

Anti-LGBT HCC Board Member, OutSmart Mag. (Aug. 11, 2015) (highlighting a pattern of Wilson's anti-LGBT behavior, including an attempt to enter Houston's Pride parade as an "anti-gay" applicant).

Wilson often lashed out and harassed Board members whenever he disagreed with the Board's resolutions. Wilson regularly made baseless accusations against the Board, alleging illegal and unethical conduct. Resolution of Censure, HCC Board (Jan. 18, 2018) ("HCC Legislative Censure"). On at least two separate occasions, he hired a private investigator to surveil a fellow Board member and once hired a private investigator to investigate the Board as a whole. Brittany Britto, *Controversial HCC Board Member Resign*s, Announces New Candidacy, Hous. Chron., (Aug. 27, 2019). Disagreeing with Board's decision to fund a campus in Qatar, Wilson launched a public campaign against the Board using robocalls and radio station appearances. *Id.* Following other disputes, Wilson filed several lawsuits against HCC, incurring nearly $273,000 in legal fees to the college. *Id*.

After five years of dealing with Wilson's litigious and combative behavior, the Board voted to censure Wilson (the "Censure") for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct." HCC Legislative Censure.

B. Procedural History [Abbreviated for Sample]

Wilson filed a lawsuit under 42 U.S.C. § 1983 against HCC, alleging that the Board's censure violated his right to freedom of speech under the First and Fourteenth Amendments. He seeks injunctive relief, damages for mental anguish, and punitive damages.

The district court granted HCC's motion to dismiss for lack of subject matter jurisdiction. The district court held that Wilson failed to demonstrate any injury-in-fact to establish standing. *Wilson v. Hous. Comm. Coll. Sys.*, 2019 WL 1317797 at *3 (S.D. Tex. Mar. 22, 2019).

The Fifth Circuit reversed, finding that "mental anguish" was sufficient to support standing and that Wilson had a plausible claim under § 1983. *Wilson v. Hous. Comm. Coll. Sys.*, 955 F.3d 490 (2020). The Fifth Circuit denied rehearing en banc. *Wilson v. Hous. Comm. Coll. Sys.*, 966 F.3d 341 (2020).

On April 26, 2021, the Supreme Court granted certiorari to hear the case.

SUMMARY OF ARGUMENT

[OMITTED]

ARGUMENT

The First Amendment does not permit the government to suppress speech. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Free speech, one of the nation's bedrock principles, protects the marketplace of ideas and the right to voice unpopular ideas without government retaliation. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). However, free speech does not mean freedom from criticism. Speakers must bear the consequences of their actions. The Censure serves as a fair and lawful consequence. It has no power to suppress or compel the censured party's speech. Rather, it constitutes a legislative's body's own speech in response a party's actions. The legislative censure, as employed against Wilson, is constitutionally valid.

I. The censure does not infringe on Wilson's free speech rights because it did not punish him for exercising those rights.

The First Amendment prohibits a government official from retaliating against an individual for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). A government

action impermissibly infringes on free speech when it punishes or threatens to punish through measures that are "regulatory, proscriptive, or compulsory in nature." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). While actions such as "imprisonment, fines, injunctions, or taxes" may constitute unconstitutional measures, discouragement that is "minimal" and "wholly subjective" does not infringe upon free speech rights. *United States v. Ramsey*, 431 U.S. 606, 623-24 (1977).

The Court has not clearly defined the line between unconstitutional "regulatory, proscriptive, or compulsory" measures and constitutional "minimal" discouragement. At the very least, however, a legislative censure is far from the measures the Court has held to violate the First Amendment. The Court's reasoning in those cases should not extend to the Censure; instead, the Censure is more appropriately characterized as a minimal discouragement.

The Court has previously found those retaliatory actions which substantially impair or deprive a person of their rights violate the First Amendment. Firing an untenured teacher for publicly made comments constitutes a violation of the teacher's First Amendment rights if the speech constituted a "substantial" or "motivating" factor in firing the teacher. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977). Similarly, prosecution or arrest is unconstitutionally retaliatory if there is "no probable cause" for the underlying criminal charge and if retaliation was a substantial factor behind the prosecution or arrest. *Hartman v. Moore*, 547 U.S. at 265-66 (striking down prosecutions not supported by probable cause); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726-27 (2019) (finding retaliatory arrests that are not supported by probable cause violate the First Amendment). Other cases similarly find that substantial deprivations in retaliation of protected speech are unconstitutional. See, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 5 (1971) (rejecting a denial to the state bar based on an applicant's political views); *Baggett v. Bullitt*,

377 U.S. 360, 361 (1964) (finding conditional employment based on a loyalty oath to be unconstitutionally vague).

The reasoning in those cases should not apply to non-punitive actions like the Censure. The legislative censure is fundamentally different from previously invalidated actions because it does not have the force of law. It does not, and cannot, deprive a party of his rights.

While the Court has not evaluated the constitutionality of legislative censures, several circuits courts have upheld the constitutionality of legislative censures for two key reasons. First, a legislative censure has no force of law. *See Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994) (holding that a resolution "expressing disapproval and outrage" does not have the effect of "law"). A legislative censure cannot "control the conduct of citizens" or "create public rights and duties." *Id.* The distinction between an action with legal force and one without legal force is essential. The Sixth Circuit highlighted this distinction noting that while *laws* prohibiting certain conduct, like flag burning, are unconstitutional, a *legislative resolution* "expressing the political view that flag burning . . . [is] morally wrong" is not a law abridging freedom of speech. *Id.*

Second, because a legislative censure necessarily has no force of law, it is not a proscriptive measure. The Tenth Circuit upheld a similar legislative censure when it found that the censure carried "no penalties." *Phelan v. Laramie Cnty. Comm. Coll.*, 235 F.3d 1243 (10th Cir. 2000). The legislative censure did not prevent the censured party from "performing her official duties or restrict her opportunities to speak." Similarly, the Ninth Circuit upheld legislative action removing a party as Vice President of the Board since the removal did not "chill his speech." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 (9th Cir. 2010).

Similarly, Wilson has failed to demonstrate injury to his free speech rights. The Censure does not stop Wilson from performing his official duties. Wilson is free to continue attending and voting in Board meetings. The Censure does not stop Wilson from speaking publicly, as he proven repeatedly since being censured. As was determined by other courts, the Censure is not a "proscriptive, regulatory, or compulsory" measure violating First Amendment.

Other lower court decisions related to First Amendment retaliation support this position by noting that conduct that merely expresses disapproval is a minimal discouragement. The Fifth Circuit has held that being "verbally reprimanded" by a supervisor is a minimal criticism that is not actionable under the First Amendment. *Bennington v. City of Houston*, 157 F.3d 369, 376-77 (5th Cir. 1998); *see also, Harrington v. Harris,* 118 F.3d 359, 366 (5th Cir. 1997) (holding that a employers' criticisms and failure to award merit pay increases is not actionable under the First Amendment). Similarly, the Second Circuit has held that, absent "threats, coercion, or intimidation," a legislator's "disparaging, accusatory, or untrue statements" would not amount to an actionable First Amendment Claim. *X-Men Sec. Inc. v. Pataki*, 196 F.3d 56, 72 (2d. Cir. 1996).

The Censure itself constitutes no more than a reprimand. It has no power to coerce, threaten or intimidate. By its own admission, the Censure notes that it cannot take punitive action, like removing Wilson from office. HCC Legislative Censure. At most, the Censure presents the Board's view that Wilson acted in a manner out of accord with the Board's Bylaws and Code of Conduct. HCC Legislative Censure.

Wilson attempts to argue that the Censure violates his free speech rights by pointing to a narrow line of Fifth Circuit case law addressing an independent judicial commission's public reprimand of state court judges. *See Jenevein v. Willing*, 493 F.3d 551, 561-62 (5th Cir. 2007)

(striking down the State Commission on Judicial Conduct's Order of Public Censure against Judge Jenevein as a violation of Judge Jenevein's First Amendment rights); *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990) (finding the Texas Commission on Judicial Conduct's public reprimand of Judge Scott violated the First Amendment). However, those cases do not apply to a legislative censure. The cases concern an independent judicial commission's public reprimand of an elected judge.

Since the reprimands at issue in those cases came from independent judicial commissions, they carry a greater amount of weight than a legislative censure. As the Fifth Circuit noted, the Commission is an "independent" body who had the authority to "discipline" judges. *Scott v. Flowers*, 910 F.2d at 208. Discipline by the Commission could lead to a recommendation to the state Supreme Court to remove the judge from office. Tex. Const. art. V § 1-a. Conversely, a legislative board consists of members that are equals. *See e.g., Blair v. Bethel Sch. Dist.*, 608 F.3d at 544 (finding an action "taken by his peers in the political arena" did not violate the First Amendment). It would strain reason to suggest that criticism from a *fellow* judge would violate the First Amendment rights of another judge. The key fact that the public reprimand came from an authoritative, external Commission lends the reprimand greater weight. The Censure, which came from a group of peer legislators, does not carry substantial authoritative force. Wilson's reliance on this line of cases is misplaced since they address an entirely different issue.

Wilson fails to establish that the Censure has violated his First Amendment rights. The Censure, at most, serves to express disapproval of Wilson's actions. It is not "proscriptive, compulsory, or regulatory." The Censure does not constitute unconstitutional retaliation by the Board.

II. The Censure is constitutionally protected government speech by the HCC Board.

The purpose of the First Amendment is to facilitate an active and healthy public discourse. *New York Times Co. v. Sullivan*, 376 U.S. at 270. Justice Brandeis stated that "if there be time to espouse through discussion and falsehood and fallacies . . . the remedy to be applied is *more speech*, not *enforced silence*." *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added). Wilson, however, argues the opposite. Wilson argues that while the First Amendment grants him the right to publicly voice complaints about the Board, hire private investigators, and harass members of the Board, the First Amendment would render the Board powerless to respond. This argument is plainly false.

It is well-recognized that the Free Speech Clause restricts "government regulation of private speech." However, it does not regulate government speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009). In *Meese v. Keene,* the Court established the constitutionality of a government's right to speech. 481 U.S. 465 (1987). *Meese v. Keene* upheld a provision of the Foreign Agents Registration Act requiring the federal government to label certain media as "political propaganda." *Id.* at 467-68. The statute only sought to "inform recipients of advocacy materials produced under the aegis of the foreign government." *Id.* at 478. It did not prohibit dissemination of those materials or censor them in any way. *Id.* Instead, the Act enabled the government to enter the public discourse by presenting the government view on certain materials. Notably, the Act did not prohibit disseminators of media labeled as "political propaganda" from countering the government's label. They were permitted to add additional facts or allegations to the conversation. The Act merely recognized the "best remedy for misleading or inaccurate speech . . . is fair, truthful, and accurate speech." *Id.* at 482. *Meese* ultimately affirmed the

government's right to engage in the public dialogue by expressing its own views on a particular issue.

Since *Meese,* a government body's right to speech has been repeatedly upheld. *See, e.g., Pleasant Grove City, Utah v. Summum*, 555 U.S. at 467 (upholding a city's decision to accept certain donations while rejecting others as a form of protected "government speech"). The government is entitled to engage its own speech and is entitled to say what it wishes. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Indeed, it is the "very business of government to favor and disfavor points of view." *Na'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring).

The Censure constitutes protected speech by a government body. One legislator's criticism of another legislator is plainly protected speech. In fact, it is that very criticism and dialogue which fosters a robust legislative discourse and is at the heart of the political process. If multiple legislators criticize another member of the legislature, it will strain credulity to suggest that those legislators are infringing on the First Amendment rights of the other legislator. Similarly, the whole legislative body must be permitted to exercise its own free speech. The Censure represents precisely that: a representation of the collective view of a group of legislators.

Furthermore, as was the case in *Meese*, the Censure itself has no power to remove or punish Wilson. Instead, it was an expression that a particular individual, Wilson, has acted out of accord with the Board's bylaws. HCC Legislative Censure. Wilson had full power to counter the speech made by the government and interject his own views with relation to the Censure. He could not reasonably fear removal or other punitive action because the Censure had no power to enforce any punitive measures. HCC Legislative Censure. The Censure is best characterized as the start of a

dialogue between the Board, Wilson, and the people. It serves to inform the public of the behavior of their representative: Wilson. Wilson, in turn, is permitted to respond, providing his own view on his actions.

In the legislative context, government speech serves an especially important purpose. Legislators are policymakers. They are elected for their views and are accountable to their constituents. Given the need for robust debate in crafting policy, the First Amendment requires legislators be given the widest latitude to express their views. *Bond v. Floyd*, 385 U.S. 116, 136 (1996). As a consequence of their position, policymakers are held accountable for their views and may be removed from office by voters based on those views. This consequence of policymaking is made more salient since the Court has specifically held that non-policymakers *cannot* be removed based on advocacy of ideas. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Proliferation of ideas promotes democracy. It is in that spirit that the Censure was adopted, to educate the public on Wilson's actions and form a collective statement denouncing it. The Board is in the best position to interject an educated opinion on the conduct of its members. To categorically prevent them from doing so robs the voting population of potentially critical information about the actions of their elected representatives.

Circuit courts that have considered legislative censures have emphasized the importance of permitting censures as government speech. In *Phelan*, the Tenth Circuit stressed the value of the censure in "furthering uninhibited, robust debate on public issues. *Phelan v. Laramie Cnty. Comm. Coll.*, 235 F.3d at 1248. The court expressly found that, in issuing a censure, the Board "sought only to voice their opinion that [Phelan] violated the ethics policy and to ask [Phelan] not to engage in similar conduct in the future." *Id.* Similarly, the Sixth Circuit emphasized that the

very principle that protected Zilich's right to oppose other politicians without retribution allowed *them* to oppose him. *Zilich v. Longo*, 34 F.2d 359, 363 (6th Cir. 1994). Not only is it permitted, but it is regular practice. Members of legislative bodies often adopt resolutions approving or condemning the conduct of other elected officials. *Id*. The First Amendment is not meant to "outlaw partisan voting or petty political bickering." *Id.* These principles serve to protect the right of a legislative body to issue a censure criticizing one of their own members.

Wilson attempts to use the First Amendment as both a sword to attack the Board and as a shield to protect himself from judgement. He cannot have it both ways. The First Amendment allows him to express his views, however unpopular. The First Amendment protected his right to deceive voters into thinking he was endorsed by a respected, local politician when, in fact, the fine print specified he was endorsed only by his cousin of the same name. The First Amendment protected his right to vehemently oppose the actions of the Board and publicly denounce several measures the Board had taken. The First Amendment protected his right to make controversial statements during Board meetings. The First Amendment, however, cannot protect him from the consequences of those actions.

The First Amendment permits the Board to respond to Wilson. The Board has the power to express their own beliefs regarding Wilson's actions and have freely exercised that right in issuing the censure. The same constitutional principles that protect Wilson also protect the Board in issuing the censure.

III. Legislative censures are an established common-law practice that have been in use since the Founding Era.

[OMITTED]

IV. The *Pickering/Connick* balancing test maintains the Censure is a constitutionally permissible action.

[OMITTED]

CONCLUSION

The judgement of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Sruthi Venkatachalam
Yale Law School
127 Wall St.
New Haven, CT 06511
203-432-4992

Applicant Details

First Name	**Cameron**
Last Name	**Wallace**
Citizenship Status	**U. S. Citizen**
Email Address	**cfw2127@columbia.edu**
Address	**Address** Street **206 West 96th Street 2C** City **New York** State/Territory **New York** Zip **10025** Country **United States**
Contact Phone Number	**318-840-3253**

Applicant Education

BA/BS From	**Rice University**
Date of BA/BS	**May 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Transnational Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Doyle, Michael
md2221@columbia.edu
212-854-3061
Frederick, Davis
ftd3@columbia.edu
Yale-Loehr, Stephen
swy1@cornell.edu
607-254-4759

This applicant has certified that all data entered in this profile and any application documents are true and correct.